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SPEEDING IN REVERSE: AN ANECDOTAL VIEW OF WHY VICTIM IMPACT TESTIMONY SHOULD NOT BE DRIVING CAPITAL PROSECUTIONS

Sheri Lynn Johnson†

INTRODUCTION

It seems appropriate to end this conference with the story of how it began—with the story of Shanan Ardis. The State of South Carolina prosecuted Shanan for the capital murder of his father. John Blume, Bill Nettles, and I represented him, and Dr. Seymour Halleck, who ultimately testified very powerfully in Shanan's defense, diagnosed him. It was during Shanan's capital sentencing proceeding that Dr. Halleck and I started talking about the impact prosecuting Shanan would have on the surviving family members. Dr. Halleck mentioned that, as a psychiatrist, he thought the death penalty was generally harmful to victims' family members. He explained that while its harmfulness was more immediately apparent in cases involving intrafamilial homicides, such as Shanan's murder of his father, the death penalty also tended to damage family members in stranger-homicide cases because of its effects on the grieving process. He then casually mentioned that a professional organization to which he once belonged had contemplated publicly opposing the death penalty for those very effects on victims' family members. With Dr. Halleck's comments, the idea for this symposium was born, for it seemed to me that the common wisdom—that the death penalty was for the benefit of surviving victims—was wholly at odds with psychiatric insight.

The Ardis case is not an extraordinary one, but neither is it typical.[1] The victim-family dynamics in the Ardis case are idiosyncratic, or at least peculiar to intrafamilial homicide cases. Nonetheless, the story has several broad and powerful lessons related to victim impact testimony. It has shaped many of my own views; so, I will tell the story, explain those broad lessons, and let you be the judge.

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1 There is no reported decision in this case.

I

THE CAPITAL MURDER PROSECUTION OF SHANAN ARDIS

Shanan Ardis was twenty-one years old when he killed his father, Jeff Ardis. The homicide was neither clean nor quick. Shanan had lived in Louisiana with his mother for most of his life, but as a young adult he moved to South Carolina to work construction jobs. There he lived with his father and his father's girlfriend, Linda Timmerman. After a day of heavy drinking, Shanan came home and stabbed his father from behind. Over the course of several hours, he held his wounded father and his father's girlfriend captive with a knife, taunting them and refusing to allow them to call 9-1-1. Finally, Shanan forced Linda to crawl upstairs, unlock a case, and remove from it a gun, which he then used to shoot his father. The police arrested Shanan minutes after he left his father's home. While in jail awaiting trial, Shanan was charged with assisting another inmate in committing suicide. Although the State did not dispute that the inmate wanted to kill himself and sought Shanan's assistance, this second homicide also was not pretty; Shanan was accused of strangling the inmate to death with a sock. To make matters worse for Shanan, this case occurred in Lexington County, South Carolina, a suburb with a much higher death-sentence rate, even, than Harris County, Texas.[2]

Knowing only these facts, it is easy to see why lead counsel, John Blume, sought to retain Dr. Halleck's services. To put it mildly, there was some explaining to do. In fact, as Dr. Halleck uncovered, there *was* a powerful explanation: paranoid schizophrenia, with religious delusions. Shanan was probably genetically predisposed to this extreme mental illness, and his social history both shaped and accelerated its effects; he had a past which included child abuse, a mentally ill mother, and religious upbringing in a cult. Moreover, each of these contributing factors pointed to Shanan's father as the most likely target of Shanan's violent impulses. First, as a young child, both of Shanan's teenaged, intensely unhappy parents had repeatedly subjected him to physical abuse. Second, his mother Anita, who suffered from borderline personality disorder, constantly primed Shanan to hate and fear his father and even failed either to discourage or report Shanan's fantasies of killing his father. And third, the millenialist cult to which Shanan and his mother belonged strongly condemned nonmarital sexual relationships, such as the one Shanan's father enjoyed with his live-in girlfriend. Indeed, Shanan's mother urged him to view this relationship as adulterous, despite her divorce from his

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[2] My colleague, Theodore Eisenberg, confirmed this claim by analyzing data from the Bureau of Justice Statistics' database *Capital Punishment in the United States*, the FBI's *Supplementary Homicide Reports*, and James S. Liebman's *A Broken System: Error Rates in Capital Cases, 1973-1995*. The analysis is on file with the *Cornell Law Review*.

father, because she claimed that in God's eyes, Shanan's father was still married to her.

Obviously, these facts regarding Shanan's family were crucial to mounting his penalty phase defense, but their centrality was not limited to how well they complemented Dr. Halleck's diagnosis. Equally important was their bizarre refraction through the lens of victim impact testimony. From the time my co-counsel, John Blume, was assigned to the case to the moment the court imposed its sentence, the prospect of victim impact testimony shaped, or perhaps more accurately, *warped*, trial strategy.

The first question to arise was who "counted" as a family member.[3] The solicitor tried to position the long-term girlfriend as Jeff's common-law wife, a contention the defense disputed. If she were not Jeff's "wife," then his nearest kin—other than Shanan himself, the victim's only child—were his siblings and parents. Blume had worked hard at developing a relationship with Jeff's family, mostly with one brother, Gene Ardis, who acted as the spokesman. From very early on, it was obvious that Linda desperately wanted the death penalty, but the rest of the family members were initially hesitant to take a position and over time came to lean away from lethal injection; Shanan was, after all, also their kin. So the question of Linda's status was important, and on this matter Shanan was lucky: Although Jeff and Linda lived together and dated exclusively for years, they did not hold themselves out as married, as is generally required for common-law marriage in South Carolina.[4]

Second, there was the question of who, if anyone, would hear the preferences of the victim's family members. In South Carolina, if a jury hangs in the penalty phase, the defendant receives a life sentence.[5] As a result, normally there are very strong incentives to try death penalty cases before juries. "All" the lawyers have to do is to convince one juror out of twelve to hold firm to the view that a life sentence is more appropriate than death. Moreover, in South Caro-

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3 *See* S.C. CODE ANN. § 16-3-1520 (Law. Co-op Supp. 2001) (including in the Victim's Bill of Rights "the family members of a . . . homicide victim").

4 *See, e.g.*, Barker v. Baker, 499 S.E.2d 503, 506–07 (S.C. 1998) (stating that a common-law marriage exists "if the parties intend to enter into a marriage contract," and noting that proof of such an intention typically entails a showing that the parties "publicly held themselves out as husband and wife"). South Carolina law also happened to exclude from the sentencing proceeding the view of someone who did *not* want a death sentence imposed. Although the solicitor relied in part on the jailhouse killing for his proof of aggravation in the murder of Jeff Ardis, the views of that victim's mother—who adamantly opposed the death penalty—were irrelevant under the statute.

5 *See* S.C. CODE ANN. § 16-3-20(C)(b) ("If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed . . . the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment . . .").

lina the public overwhelmingly supports the death penalty,[6] and this same public elects judges. Therefore, judges have an incentive to impose death sentences that juries do not.[7] In this case, however, a jury trial also came with a substantial disadvantage. If the victim's family wanted a death sentence, the factfinder, whether judge or jury, would hear their testimony and would be able to infer their wishes. But if, as in this case, the family did *not* want a death sentence, then the jury would never know, for South Carolina courts, as well as those of most other jurisdictions,[8] do not permit family members to express an ultimate view on the sentence; no vehicle exists to clue the jury as to what the family wanted. A judge, however, would be allowed to hear the family's wishes. A judge in any jurisdiction might have informal knowledge of the victim's family's wishes. But in South Carolina the judge would be certain to know because the statute provides that when a judge determines the sentence, he or she must permit victim family members to submit a statement. Accordingly, we employed a strategy that, absent the victim impact considerations, would be idiotic: We decided to try the case in front of the judge.

Both parties, however, must agree to waive a jury trial, and for the same reasons we wanted a bench trial, the solicitor did not. In this case, we could circumvent his refusal by a guilty plea, which does not require the solicitor's consent, and which results in judge sentencing.[9] Thus, victim impact considerations also drove the decision to plead guilty. Because the evidence of guilt was uncontestable, that decision was not as hard as it might be in other cases.

Before the start of the sentencing proceeding, the Ardis family—Jeff's parents and brother Gene—signed a letter addressed to the judge stating that they did not want Shanan to receive a death sentence. One might then assume that the views of victim family members would have little impact from that point on, but such an assumption would be wildly wrong. Linda Timmerman's initial testimony, admissible not as victim impact testimony but as a description of the crime, was extended, extremely emotional, and described a substantially more aggravated crime (in terms of the length of time Shanan kept Jeff and Linda hostage, the extent of Jeff's suffering, and

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6 *See, e.g.*, Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 90 S. CAL. L. REV. 371, 380 tbl.1 (2001).

7 *See generally* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995) (explaining the link between politics and the death penalty); Stuart Taylor, Jr., *The Politics of Hanging Judges*, LEGAL TIMES, Oct. 30, 1995, at 25 (articulating the same proposition).

8 *See* John Blume, *Ten Years of* Payne*: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 276 tbl.2 (2003).

9 *See* S.C. CODE ANN. § 16-3-20(B).

the seriousness of the threat to her own life) than did her earlier statements. It was clear what penalty she wanted. Nonetheless, I did not cross-examine her on her exaggeration or inconsistencies. Instead, I pursued only two brief lines of questioning. First, I wanted to establish that her relationship with Jeff was not truly spousal; that she and Jeff had not actually lived together for very long, that the house they lived in was in his name only, and that they had not held themselves out as married. The second area of questioning concerned Jeff's feelings about his son; that Jeff loved Shanan and wanted the best for him.

As Linda was testifying to her dramatic and horrible story, another smaller story was playing out in the courtroom. South Carolina law provides for a Victim Assistance Program,[10] and a representative of that office sat with the Ardis family throughout the trial.[11] It seemed obvious to us that the Victim Assistance Program office was less than neutral in this case, if it is neutral in any case, and we feared that the "assistant" was trying to convince the family to ask for death.

Thus, in deciding what to ask Dr. Halleck when he took the stand, we were reluctant to have him cast Jeff in a negative light, fearing that it might aid the victim assistant's efforts to pressure the family to ask for death, or at least to retract their written statement that they were not seeking death. Indeed, during the direct examination of Dr. Halleck, John deliberately steered far away from the physical abuse Shanan had suffered at the hands of his father. But on cross-examination, when the solicitor questioned Dr. Halleck as to why the illness he described would prompt violence toward a father who was, at the time of the crime, treating Shanan in a generous and loving way, Dr. Halleck had to tell the truth. In one sentence, he said that Jeff, as a young father, had been "brutal" toward Shanan.

That was enough. We cringed, and saw the victim assistant whispering furiously to Gene Ardis. Then, at the next recess, the assistant pulled Gene outside for a conference with the solicitor. At that point, we feared that Gene would agree to be a witness for the prosecution and ask for the death of our client. Meanwhile, on our own side of the courtroom, we were worried about another possible recruit to the solicitor's cause. That possible recruit was Shanan's own mother, Anita, who threatened that if the social worker said *anything* critical of her or her mothering, she would get up on the stand and ask for her son Shanan's death. Technically, she had no right to voice her preferences, but if she approached the solicitor, it would be very difficult to

10 *See* S.C. CODE ANN. § 16-3-1410.

11 That office was created by a legislator whose sister was a murder victim; the sister's killer was then on death row and was at that time represented by none other than John Blume and me.

predict to what facts she might have testified, and what the impact would have been. We will never know, because we decided against presenting the facts about Antia's own mental illness and how it led to bizarre patterns of neglect and emotional abuse of her son. Of course, we will also never know if she would have carried out her threat, but we do know that she went home to Louisiana immediately after the last witness testified, apparently less interested in whether the court sentenced her son to death than what was said about her.

It did not surprise us when Gene Ardis took the stand in the prosecution's rebuttal case. However, what he said did surprise us, and in all likelihood, surprised everyone in the courtroom. The beginning of his testimony was probably much as scripted. He talked about what a fine person his brother Jeff was and how any charge of brutality toward Shanan was a lie. Then he talked about how he missed his brother and of the sadness that he and all of his family felt. He spoke of the pain his mother felt in losing her son, and her grandson, and how she could not even talk about it. But then, instead of asking for Shanan's death, his testimony ended abruptly with this statement: "But now, my thoughts turn to Shanan and I can't help but think of what will happen to him, and that we love him too." The courtroom was silent. There was no cross-examination.

After closing arguments and an overnight recess, I walked up to Gene Ardis and told him that judges usually allow a family member to speak to the defendant after sentence is pronounced, but that Shanan was effectively alone in the courtroom because his mother and sister had, the night before, left the state. I asked Gene if he would consider speaking to Shanan after the judge pronounced the sentence, and Gene said he would.

After what seemed like an incredibly long fifty minutes, during which the judge orally reviewed and evaluated all the evidence, including a terrible stretch when he explained why he was rejecting Dr. Halleck's diagnosis, the judge sentenced Shanan to life imprisonment without the possibility of parole. I stood there convinced the sentence was due to the victim's family members' wishes, while John brought Gene Ardis to speak to his nephew Shanan before they took him away for the rest of his life.

II
REFLECTIONS ON VICTIM IMPACT

Shanan, who is now on anti-psychotic medication, may spend the rest of his life trying to unravel this story. I draw from Shanan's story two less common arguments against admitting victim impact testimony, and two improvements I think would be significant, assuming

arguments for abolition—or at least abolition of victim impact testimony—do not prevail.

A. Who Is the Driver?

Professor Beloof makes an extended argument supporting victim family members' interest in stating their sentencing preferences.[12] In so doing, he relies upon historical rights of victim participation. The problem with this argument, however, is that it leaps far too quickly from the victim to the victim's family members. Putting aside the question of whether victims should have a recognized right to speak, the obvious problem in homicide cases is that they cannot. Beloof assumes that the next best thing is for the victims' family members to speak for the victims.[13] Next best to a historically recognized right, however, does not always support the creation of another right, a proposition the Supreme Court made crystal clear in another substituted judgment case, *Cruzan v. Director, Missouri Department of Health.*[14]

In *Cruzan*, the petitioners contended that an incompetent person has the same right to refuse medical treatment as does a competent person.[15] The Court rightly observed that this formulation of the claim begs the question because "[a]n incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right."[16] Obviously, this statement applies equally to dead victims! To the contention that the Constitution required Missouri to accept the "substituted judgment" of close family members concerning the removal of life support to Nancy Cruzan, the Supreme Court responded that "the Due Process Clause [does not] require[ ] the State to repose judgment on these matters with anyone but the patient herself."[17] The Court explained that "there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent."[18]

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12 *See* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282 (2003).

13 *See id.*

14 497 U.S. 261 (1990).

15 *Id.* at 279.

16 *Id.* at 280. The Court then held that a State may apply a "clear and convincing evidence" standard in determining what, if any, wishes the incompetent person, while still competent, had expressed concerning cessation of artificial food and hydration. *Id.* at 286–87. Obviously, no victim impact evidence, as we know it, contemplates any such determination of what the victim would have wanted, nor do I think Professor Beloof is contemplating such a determination.

17 *Id.* at 286.

18 *Id.*

Perhaps Shanan's case did not inspire this constitutional comparison. It does, however, illuminate the non-constitutional question of whether allowing such "substituted judgment" is good policy for the states. Intrafamilial homicide cases are the perfect vehicle for observing that the victim, if given a choice, might have been desperately opposed to a death sentence; yet, his or her family members might want death equally desperately. To me, it seems certain that Jeff Ardis would not have wanted the State to execute his son; his girlfriend Linda, however, had no similar or significant ties to Shanan. Nonetheless, had Linda and Jeff been married, her voice would have been the one that the judge heard and counted.[19] Such different loyalties are not uncommon in intrafamilial homicide cases, but they can also occur in stranger-homicides, in which the surviving family members may not share the victim's own view about the death penalty. In several states there have been campaigns to get private citizens to sign "'[n]ot in my name'" cards, or some form of notarized statement indicating that if the signatory is murdered, he or she asks the state not to seek the death penalty.[20] Obviously, the prosecutor is not bound to honor such a request, but perhaps less obviously, neither does it bind a relative delivering victim impact testimony.

More commonly (indeed, even more commonly than in cases of incompetent patients and continuation of life-sustaining treatment), a murder victim may never have contemplated that he might be murdered and whether he would like the death penalty visited upon his murderer. Moreover, even those ordinary people[21] who contemplated such contingencies are unlikely to have communicated such thoughts to family members. Thus, the victim's family may often be forced to guess at what the victim would have wished, or they may simply substitute their own wishes.

Different relatives, however, may come to different conclusions, both on the question of the victim's likely wishes and on the matter of their own preferences. Linda Timmerman had a different view than did Gene Ardis, and Jeff's parents probably had less well-defined views than either Linda or Gene. One could respond that the state should present the full variety, but at least under *Payne v. Tennessee*,[22] a balanced view is impossible. Because victim impact testimony may not include overt statements of the family members' sentencing desires, jurors ordinarily will not hear family members who oppose the death penalty. Indeed, death-seeking family members are free to recount, in

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19 *See* S.C. CODE ANN. § 16-3-1510(1) (Law. Co-op. Supp. 2001) (including a spouse within the definition of a victim allowed to speak).

20 *See, e.g.*, Jillian Lloyd, *Activists Promote Pocket-Size Protest over Death Penalty*, CHRISTIAN SCI. MONITOR, Dec. 29, 1998, at 2.

21 In this respect at least, lawyers may not be ordinary people.

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

testimony that the jury will likely understand as a plea for death, the characteristics of their loved one, their own suffering, and even the suffering of those family members who oppose a death sentence in testimony that the jury will likely understand as a plea for death. After all, common sense tells the juror that if a family member did not want the death penalty, he or she would not agree to testify in the sentencing phase.

Thus, victim impact testimony may contradict the victim's wishes and run roughshod over the wishes of some of the victim's family members. Even when it does not do so, the likelihood that victim impact testimony will produce these irrational outcomes argues against admitting such evidence.

B. Look Ma, No Hands!

In *Booth v. Maryland*, the U.S. Supreme Court excluded victim impact testimony on the ground that such evidence diverts the jury's attention away from its proper focus: the defendant's moral culpability.[23] To assess that culpability requires attention to the defendant's background, his record, and the circumstances of the crime, but not to the relative worth of the victim.[24] As John Blume discusses at greater length in his article,[25] *South Carolina v. Gathers* affirms the Court's recognition of the appropriate focus of the sentencing determination. Underscoring the distinction between defendant culpability and victim worth, the Court noted that "the content of the various [religious] papers the victim happened to be carrying when he was attacked was purely fortuitous and cannot provide any information relevant to [Gathers's] moral culpability."[26] The Court's subsequent decision in *Payne* does not overrule the *Booth/Gathers* determination that victim impact evidence is irrelevant in assessing blameworthiness, but it demurs that blameworthiness is not the sole legitimate factor in the capital sentencing determination. Indeed, the Court noted that assessment of harm is a second "important concern of the criminal law . . . in determining the appropriate punishment."[27] According to the Court, "there is nothing unfair about allowing the jury to bear in mind [the harm caused by the defendant] at the same time as it considers the mitigating evidence introduced by the defendant."[28]

I am no expert on substantive criminal law, so perhaps the *Payne* Court's reasoning has more force than I apprehend. Be that as it may,

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23 482 U.S. 496, 504–05 (1987), *overruled by Payne*, 501 U.S. at 830.

24 *Id.*

25 *See* Blume, *supra* note 8, at 260–62.

26 490 U.S. 805, 812 (1989), *overruled by Payne*, 501 U.S. at 830.

27 501 U.S. at 819.

28 *Id.* at 826.

the experience of defending Shanan Ardis leads me to borrow the Court's own tactic and demur to *its* rhetorical contention. Even assuming harm is a legitimate factor in the calculus of ultimate punishment, the cost of introducing victim impact testimony into the calculus of capital trial strategy seems enormous. True, the strategic choice to withhold Shanan's entire social history in response to his mother's threat to ask for the death penalty is a scenario unlikely to be precisely replicated in another case. However, the decision not to fully explore Shanan's history with his father is far more representative of capital cases, and it reveals that strategic calculations about victim impact testimony will often deprive the factfinder of information that may help explain the offense or the offender. In such cases, defense counsel must weigh the benefits of introducing relevant evidence against the risk that the evidence might induce the introduction of victim impact testimony. In intrafamilial homicides, for example, the reason for such strategizing is obvious. Frequently, the victim played an unflattering role in the defendant's social history, and defense counsel accurately portraying that role may lead to members of the victim's family retaliating through victim impact testimony. In acquaintance and stranger homicides, the trade-off may be less obvious but nonetheless equally costly in terms of limiting defense counsel's options. For example, there may be facts about the offense that reflect something stigmatizing about the victim, such as homosexuality, extramarital sexual activity, prostitution, or drug use. While these facts could mitigate the moral culpability of the defendant, or even cast doubt on whether a particular homicide was death-eligible,[29] defense counsel may elect to forego the potential benefits out of fear that presenting those facts may spur relatives to "defend" the reputation of the victim through victim impact testimony.

Moreover, even when defense counsel does not forego presenting mitigating information, victim impact testimony may skew the factfinding process because such testimony is difficult for the defense to rebut. For example, the *Payne* majority dismissed concerns that the State may present inaccurate testimony without challenge, reasoning that "the mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of a dilemma."[30] Lest the reader of *Payne* think that capital sentencing proceedings require enhanced reliability, as the cases on the right to present mitigat-

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29 For example, kidnapping is generally an aggravating factor that renders a homicide death-eligible. *See, e.g.*, S.C. CODE ANN. § 16-3-20(c)(1)(b) (Law. Co-op. Supp. 2001). If defense counsel can show the existence of a prior relationship between victim and defendant, she may be able to cast doubt as to whether the victim indeed was kidnapped.

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

ing evidence hold,[31] the Court quickly points to its holding in *Barefoot v. Estelle*,[32] which permits a court to admit testimony on future dangerousness despite the American Psychiatric Association's assertion as amicus curiae that "'[t]he unreliability of psychiatric prediction of long-term future dangerousness is by now an established fact within the profession.'"[33]

While I would never defend *Barefoot*, it does seem to me that the *Payne* Court overstates that decision. Although expert testimony on future dangerousness and victim impact testimony are both susceptible to claims of unreliability, the problem with victim impact testimony is not merely that it is unreliable. Rather, the testimony is biased in a way unlikely to be susceptible to cross-examination. At least defense counsel could ask "Dr. Death," the notorious psychiatrist involved in *Barefoot*, about his proclivity for testifying for the prosecution, the errors he had made in the past, the position of the American Psychiatric Association on future dangerousness predictions, and the fact that his profession had already disciplined him. In contrast, victim family members have no such objective history, and exploring their possible motives to fabricate is unlikely to be a productive use of cross-examination. It is of no benefit to the defense when a victim's spouse concedes that she exaggerated her husband's good traits because she wants his killer to get the death penalty. Moreover, if the family member does not desire revenge, but instead wants the public to remember the deceased in a positive light, it is even harder to imagine how defense counsel could successfully explore that desire.

Thus, victim impact testimony will often thwart the factfinding process, either by denying the jury useful mitigating information or by creating inaccurate aggravating information. Moreover, despite the *Payne* majority's protest that the purpose of victim impact testimony is not to compare the relative worth of victims, it would seem to be an inevitable consequence. As a comprehensive General Accounting Office report concludes, the race of the victim is frequently a component of the decision to seek—and impose—the death penalty.[34] Any procedure that makes race more salient is likely to increase racial disparities, and victim impact testimony will underline the racial identity of

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31 *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 110–11 (1982) (indicating that the need for heightened reliability and individualized decision making in capital sentencing prevents the state from precluding consideration of any relevant mitigating factor); Lockett v. Ohio, 438 U.S. 586, 608 (1978) (same); *see also* Turner v. Murray, 476 U.S. 28, 36–37 (1986) (holding that the need for heightened reliability in capital sentencing proceedings requires that the state permit a capital defendant accused of an interracial crime to question potential jurors about racial bias).

32 463 U.S. 880, 896–97 (1983).

33 *Id.* at 920 (citation omitted).

34 *See* U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–7 (1990).

the victim himself or herself, as well as inform the jury of the race of all of the subsidiary "victims" affected by the homicide.

Finally, there are countless other unanticipated irrationalities that victim impact testimony introduces. For example, it is bizarre to think that whether Jeff Ardis and Linda Timmerman held themselves out as a married couple should determine whether she is the voice that speaks for the victim, and therefore, whether Shanan lives or dies.[35] It is equally unnerving to contemplate that whether the victim's wife is pretty or articulate could determine whether the State executes a defendant. Capital sentencing inevitably involves some arbitrariness, but victim impact testimony vastly enhances the potential for irrationality, without substantially increasing the information a jury has about the harm the defendant's actions caused.

C. Redux: Who's the Driver Anyway?

Thus, Shanan Ardis's case endorses the wisdom of *Booth* and *Gathers*, in that victim impact testimony diverted attention from the issue of the defendant's moral culpability. Assuming, however, that at least in the short run, a return to the *Booth* rule is as likely as a return to the ideological predispositions of the *Booth* Court, I draw two modest lessons.

The first lesson is that the system should not allow "victim assistance" personnel to take the wheel. In many jurisdictions, victim assistance programs are under the umbrella of the prosecutor's office. Whether this is problematic in noncapital cases, I cannot say. In capital cases, however, the prosecution, by definition, is committed to seeking a death sentence, even though it may not be in the interest of the victim's family members. Indeed, I think it most often is not in the family's best interest because, as Dr. Halleck suggested, the death penalty negatively affects the grieving process. Furthermore, even when a capital prosecution is certain to go forward, it may not be in the interest of a family member to testify in the capital sentencing proceeding. It certainly is not in the best interest of a victim's family member to be pressured into doing so, as obviously occurred in the Ardis case. If the person the State assigns to provide "assistance" to the victims is affiliated with the prosecution, such pressure is predictable.

In addition, beyond the question of institutional loyalty is the issue of training. That is, it is important for the State's representatives to avoid injection of their own ideas and "facts" through suggestive questioning. This is a lesson that we should have learned in dealing with child sexual abuse cases. Ideally, the State should train such per-

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35 *See supra* note 4 and accompanying text.

sonnel to be neutral, to facilitate the expression of the victim's family members' views—whatever those views may be—and to support the family during the trial in whatever way family members want support. Or, if such evenhanded support proves impossible, the State could staff the office with persons of varying viewpoints. All of this, of course, assumes that the State really designed "victim assistance" to aid the victim, rather than to assist in its quest for death. If the latter is a more accurate description of the purpose of victim assistance programs, then truth in packaging is in order.

D. At Least Take the Car out of Reverse

My next proposal might surprise the reader: Assuming victim impact testimony is here for the foreseeable future, we should at least let the victim's family members explicitly state their preferences. While I disagree with Beloof's assertion that they should have a *right* to do so,[36] it seems that direct statements of preference are more likely to be helpful than indirect attempts to steer the jury toward death. In part, I say this because such statements are unlikely to significantly increase the odds of death; juries already infer the wishes of family members from their testimony in the penalty phase. Obviously, courts would prevent the *inflammatory* expression of such preferences, but forbidding victim impact testimony entirely seems pointless.

Moreover, a law permitting family members to express preferences would actually better balance the process; families that do not want the State to impose the death penalty would have an opportunity to say so, whereas they currently have no way of expressing this wish to the jury. It seems counterproductive indeed that a jury might decide to impose the death penalty based, in part, on the assumption that it will aid the family, when in fact the death penalty will prolong their ordeal or cause more grief. And in the unusual case in which the victim had expressed a general opposition to the death penalty or a desire that the State not seek the death penalty in the event he or she were to be murdered, the jury should be informed of those views, lest they impose revenge in the name of one who would have renounced it.

CONCLUSION

Payne melds together the pleas of victim family members who want to be heard and the voices of prosecutors seeking another tool to obtain death sentences. The *Payne* holding may please prosecutors, but I do not think it serves victims' family members' interests, and I know that it distorts capital sentencing proceedings in bizarre ways.

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36 *See supra* note 12 and accompanying text.

At the least, the Court should tinker with *Payne* so that it distorts less and satisfies more. Better yet, we should completely separate the tactical considerations of prosecutors from the psychological needs of victims. If what victim family members want is a formal opportunity to speak well of the person they lost, or to confront the defendant with their losses, or even to voice their feelings toward the defendant, the system can and probably should accommodate those desires—but not as part of the procedure that determines whether the defendant lives or dies.