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## I See Dead People: Examining the Admissibility of Living-Victim Photographs in Murder Trials

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# I See Dead People: Examining the Admissibility of Living-Victim Photographs in Murder Trials

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## INTRODUCTION

In the summer of 2015, the Tennessee legislature debated and passed the “Victim Life Photo Act,” which went into effect on July 1, 2015.<sup>1</sup> This law states: “In a prosecution for any criminal homicide, an appropriate photograph of the victim while alive *shall be admissible evidence* when offered by the district attorney general to show the general appearance and condition of the victim while alive.”<sup>2</sup> Victims’

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1. TENN. CODE ANN. § 40-38-103(c) (2015).

2. *Id.* (emphasis added).

rights groups lobbied for this and similar laws throughout the country, which were then enacted by state legislatures.<sup>3</sup> Though these laws amended rules of evidence, the considerations under which they were passed were largely normative, emotional, and based on concerns for victims' families in the trial process.<sup>4</sup>

In general, living-victim photographs have very low relevance. Often the only issues they demonstrate in a homicide case are the identity of an individual and that he or she was once alive, neither of which is often contested.<sup>5</sup> Thus, with little to no relevance, in-life photos are often introduced into evidence for the same reason that these laws were passed: to humanize the victim, appease grieving family members, and "elicit emotions of bias, sympathy . . . [and] retribution in the jury."<sup>6</sup>

As such, these photographs would be—and often have been—excluded from evidence during a trial as lacking relevance or being unfairly prejudicial under a Rule 403 balancing test.<sup>7</sup> New waves of state legislation, however, have eviscerated these balancing considerations, taking admissibility determinations out of the hands of judges and legislatively mandating that these photos be admissible.<sup>8</sup> Though a trial judge may have some discretion to mandate that the photo be "appropriate," a victim's photo can no longer be excluded based on relevance and unfair prejudice alone: the legislature has preemptively determined its admissibility.<sup>9</sup> This represents a dramatic and troubling shift because evidentiary regimes are designed with

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3. Three other states have enacted similar statutes. OKLA. STAT. ANN. tit. 12, § 2403 (West 2003) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . . However, in a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive."); OR. REV. STAT. ANN. § 41.415 (West 1987) ("In a prosecution for any criminal homicide, a photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive."); UTAH CODE ANN. § 77-38-9(7) (West 2014) ("In any homicide prosecution, the prosecution may introduce a photograph of the victim taken before the homicide to establish that the victim was a human being, the identity of the victim, and for other relevant purposes.").

4. See *infra* notes 29–32 and accompanying text.

5. State v. Adams, 405 S.W.3d 641, 657 (Tenn. 2013) ("[T]he photographs taken of the victim at the crime scene amply sufficed to prove her existence. The issue of [her] life or existence was not a matter of dispute at trial.").

6. State v. Collins, 986 S.W.2d 13, 20 (Tenn. Crim. App. 1998) (internal quotation marks omitted).

7. See *infra* Section II.A (discussing Rule 403 and these balancing considerations).

8. See *infra* notes 131–135, 139–143 and accompanying text.

9. See *infra* note 155 and accompanying text.

judicial discretion as a fail-safe to ensure that criminal defendants receive a fair trial.<sup>10</sup>

Though blanket admissibility of living-victim photographs may not appear to create the *most* damaging unfair prejudice against a defendant, when used in the guilt phase of murder trials, any potential unfair prejudice should be a cause for grave concern—presumably this is why trial judges in Tennessee and elsewhere routinely excluded these photos.<sup>11</sup>

The stakes for defendants are highest in criminal homicide trials, and because these trials take place almost exclusively in state courts, state court rules of evidence dictate the terms of the trial and influence the outcome.<sup>12</sup> Concerns about unfairness, improper considerations, and prejudice seeping into trials should be most heightened where a defendant's life may be on the line.<sup>13</sup> Additionally, it is equally, if not more, troubling that admissibility determinations are being mandated not by trial judges, but by state legislators at the behest of disgruntled citizens whose primary concern is “justice” for victims rather than due process for defendants.

This Note explores the problems in this rising yet underexplored trend in state evidence law, demonstrating the evidentiary, normative, and constitutional problems with living-victim photo statutes. Part I introduces the push for victim-photo legislation by victims' rights groups, using Tennessee's Victim Life Photo Act as a case study. Part

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10. See Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 289 (1993) (discussing the importance of judicial discretion). Indeed, under the Federal Rules of Evidence, there is only one narrow exception to probativity/prejudice balancing: prior crimes of deceit committed by the defendant that are less than ten years old. FED. R. EVID. 609(a)(2).

11. See, e.g., *State v. Adams*, 405 S.W.3d 641, 657 (Tenn. 2013); *State v. Strouth*, 620 S.W.2d 467, 472 (Tenn. 1981); *State v. Dicks*, 615 S.W.2d 126, 128 (Tenn. 1981) (“[I]t would have been better had the ‘before’ picture of [the victim] been excluded since it added little or nothing to the sum total of knowledge of the jury.”); see also *People v. Daughtry*, 610 N.Y.S.2d 54, 54–55 (N.Y. App. Div. 1994) (noting that living-victim photos are often irrelevant to facts at trial); *Ritchie v. State*, 632 P.2d 1244, 1246 (Okla. Crim. App. 1981) (finding error in admission of photograph of victim while alive).

12. See, e.g., *United States v. Drury*, 344 F.3d 1089, 1101 (11th Cir. 2003) (“Murder . . . is a quintessential example of a crime traditionally considered within the States’ fundamental police powers.”); see also C.J. Williams, *Making a Federal Case out of a Death Investigation*, U.S. ATT’YS’ BULL.: VIOLENT CRIMES (Jan. 2012), <https://www.justice.gov/sites/default/files/usao/legacy/2012/01/26/usab6001.pdf> [<https://perma.cc/9BE7-GUNW>] (discussing the limits on federal jurisdiction over murder cases and listing examples of federal homicide crimes, such as murder-for-hire and murder on federal land).

13. All four states identified in this Note with living-victim photo admissibility laws have the death penalty. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (July 1, 2015), <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [<http://perma.cc/K8XS-AZLE>].

II shows that such laws have the purpose and effect of eliminating judicial discretion to exclude living-victim photos. The Part first demonstrates that the traditional evidentiary tenets of relevance and unfair prejudice encapsulated in Rule 403 counsel that living-victim photos should rarely be admitted. It then establishes that these victim-photo statutes have the purpose of eliminating discretion, but have had the effect of creating Rule 403 balancing that is problematically skewed (i.e., “403 purgatory.”)<sup>14</sup> Part III argues that courts must “use it or lose it”—they must meaningfully exercise discretion as to living-victim photos or invalidate these laws, as eliminating judicial discretion violates defendants’ due process rights.

### I. TENNESSEE: A CASE STUDY

The admissibility of living-victim photographs in homicide trials has not always been clear-cut.<sup>15</sup> Historically, jurisdictions have taken varied approaches to these photos’ evidentiary weight and appropriateness in the courtroom.<sup>16</sup> Though the case law of jurisdictions has varied across time, the evidentiary foundation remained the same: judges engaged in the universal, well-founded practice of weighing the probative value of the proposed evidence against its risk of unfair prejudice, a practice known as a “403 test,” earning its moniker from the Federal Rules of Evidence.<sup>17</sup>

The 403 test is one of the most ubiquitous rules of evidence, finding its root in the common law and having a counterpart in all fifty

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14. See *infra* Section II.B.2.

15. The statutes and approaches explored in this Note deal only with admissibility of living-victim photos during the guilt phase of homicide trials. For a discussion of the admissibility of victim impact statements (which can include photographs) in the sentencing phase of homicide trials, see Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof, and Prejudice: Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1033–48 (2014).

16. Compare *People v. McClelland*, 350 P.3d 976, 985 (Colo. App. 2015) (“Because the three ‘in life’ photographs had almost no probative value, and because the prosecutor sought to elicit the jury’s sympathy based on those photographs . . . we conclude that the admission of the three ‘in life’ photographs unfairly prejudiced McClelland.”), and *Commonwealth v. Rivers*, 644 A.2d 710, 716 (Pa. 1994) (admission of living-victim photograph was error due to its purpose of “engendering sympathy for the victim with the intent of creating an atmosphere of prejudice against the defendant”), with *United States v. Pettigrew*, 468 F.3d 626, 638 (10th Cir. 2006) (“A photograph of a victim while living is admissible to prove the identity of the victim . . . the Government [has] the burden to establish the identity of the victim.”).

17. FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

states.<sup>18</sup> This balancing test's invocation of judicial discretion serves as a backdrop to all evidentiary determinations.<sup>19</sup> When undertaking a 403 balancing test, a judge examines the proposed evidence, determines its logical bearing on the case at hand, and balances that consideration against the risk that the evidence would inflame the jury, cause them to improperly use their emotions to assess the accused's guilt, or otherwise distract them from the relevant issues in the case.<sup>20</sup> Rule 403 is widely considered to be the most fundamental exclusionary principle in evidence.<sup>21</sup>

In Tennessee prior to 2015, photographs of victims while they were alive were often excluded in the guilt phase of homicide trials under the 403 balancing test.<sup>22</sup> Tennessee judges found such photos "typically lack relevance to the issues on trial" and that they have the "potential to unnecessarily arouse the sympathy of the jury."<sup>23</sup> Thus, judicial discretion counseled for their exclusion.<sup>24</sup> In response to this exclusion, victims' rights groups in Tennessee and other states began lobbying legislatures to adopt laws facilitating the admissibility of living-victim photos of victims in homicide trials.<sup>25</sup>

In Tennessee, the victims' rights group Tennessee Voices for Victims proposed a piece of legislation entitled the "Victim Life Photo

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18. See Imwinkelried, *supra* note 10, at 290 (discussing the codification of the Federal Rules of Evidence).

19. MCCORMICK ON EVIDENCE 1005 (7th ed. 2013).

20. See FED. R. EVID. 403 and advisory committee's note.

21. Imwinkelried, *supra* note 10, at 289 ("It is imperative that any body of Evidence law accord the trial judge a significant measure of discretion in applying the Rules . . . Rule 403 is the most obvious conferral of discretionary authority.").

22. See, e.g., *State v. Adams*, 405 S.W.3d 641, 657 (Tenn. 2013) (holding living-victim photograph inadmissible); *State v. Strouth*, 620 S.W.2d 467, 472 (Tenn. 1981); *State v. Dicks*, 615 S.W.2d 126, 128 (Tenn. 1981); *State v. Richardson*, 697 S.W.2d 594, 597 (Tenn. Crim. App. 1985) (same).

23. *Adams*, 405 S.W.3d at 657.

24. *Id.*

25. OKLA. STAT. ANN. tit. 12, § 2403 (West 2003) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . . However, in a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive."); OR. REV. STAT. ANN. § 41.415 (West 1987) ("In a prosecution for any criminal homicide, a photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive."); UTAH CODE ANN. § 77-38-9(7) (West 2014) ("In any homicide prosecution, the prosecution may introduce a photograph of the victim taken before the homicide to establish that the victim was a human being, the identity of the victim, and for other relevant purposes.").

Bill.”<sup>26</sup> The Tennessee legislature passed the bill, which states: “In a prosecution for any criminal homicide, an appropriate photograph of the victim while alive *shall be admissible* evidence when offered by the district attorney general to show the general appearance and condition of the victim while alive.”<sup>27</sup> Laws such as this are emblematic of the rise in victims’ rights movements and victims’ increasing role in criminal trials across the country.<sup>28</sup>

Tennessee Voices for Victims made a concerted effort to lobby state legislators to support its proposed bill.<sup>29</sup> During the legislative process, the group advocated for the bill’s passage at Criminal Justice Committee meetings holding photos of slain loved ones.<sup>30</sup> One mother of a homicide victim stated, “I don’t understand what the negativity is, where we can’t allow [photos] because sympathy of the jury. Excuse me, the jury needs to see the person before they were murdered, not just after.”<sup>31</sup> Another stated, “I strongly believe that I deserve the right to show the jury the person my son was when he was alive. They deserve to see [my son] as a bright, vibrant happy young man on the cusp of his adulthood.”<sup>32</sup>

The bill did face some legislative resistance—for example, one state representative argued at a Criminal Justice Committee hearing that “[w]e don’t want to let emotions impede on our policy of making decisions . . . we may not do exactly what y’all want to hear today.”<sup>33</sup> However, this was not enough to counteract the emotive power of justice for those killed and sympathy for their families.<sup>34</sup> As another state

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26. *Victim Life Photo Bill*, TENN. VOICES FOR VICTIMS, <http://tnvoicesforvictims.org/calendar/victim-life-photo-bill/> (last visited Feb. 27, 2016) [perma.cc/T5Y7-6W8B].

27. TENN. CODE ANN. § 40-38-103(c) (2015) (emphasis added).

28. See Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 559 (2005) (discussing the rise in victims’ involvement in criminal trials and their previous absence of involvement).

29. For example, besides sponsoring the legislation, the group’s Facebook page includes posts encouraging individuals to contact their state representatives to advocate for the bill. See *Tennessee Voices for Victims*, FACEBOOK, <https://www.facebook.com/tnvoicesforvictims/photos/a.502240276498881.1073741826.476388519084057/875433505846221/?type=3&theater> (last visited Jan. 16, 2016) [perma.cc/F9J8-5EMZ].

30. Dennis Ferrier, *Bill Would Require Judges to Allow Murder Victims’ Photo to be Shown to Jurors*, WSM TV NASHVILLE, <http://www.wsmv.com/story/28606255/bill-would-require-judges-to-allow-murder-victims-photo-to-be-shown-to-jurors#ixzz3xQuMWnYI> (last visited Jan. 16, 2016) [perma.cc/HH7K-JNZ2].

31. *Id.*

32. *Survivor Spotlight*, TENN. VOICES FOR VICTIMS, <http://tnvoicesforvictims.org/survivor-spotlight/> (last visited June 19, 2016) [http://perma.cc/DF47-436A].

33. See Ferrier, *supra* note 30.

34. *Id.* Rep. William Lamberth argued, “I’m not trying to jerk on your heartstrings, but every one of those folks was killed. From a policy standpoint, for God’s sakes, why can’t that picture be

representative stated, “[T]his legislation allows a jury to see what the victim looked like as a living, breathing human being with a family who loved them.”<sup>35</sup> Tennessee enacted the bill, and it went into effect on July 1, 2015.

## II. THE ABSENCE OF DISCRETION

The following Part will demonstrate that the Victim Life Photo Act and similar statutes have the purpose and effect of eliminating judicial discretion to exclude living-victim photos. It does so by showing that, under normal evidentiary tenets, living-victim photos generally have little to no relevance while carrying high attendant risks of unfair prejudice. Thus, under a traditional approach, judges should—and often do—exercise discretion to exclude these photos from evidence. Indeed, victim photo statutes were a direct reaction to this judicial discretion to exclude living-victim photos—they were lobbied for and enacted with the purpose of removing discretion. The result in some instances, however, has been the creation of a “403 purgatory” in which the legislature has mandated admissibility of living-victim photographs, but judges purport to retain judicial discretion to exclude them under a hobbled version of Rule 403 in which the photos are always admitted.

### A. *The Traditional Approach*

Similar to its federal counterpart,<sup>36</sup> relevance under Tennessee evidence rules “means evidence having any 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.”<sup>37</sup> Though relevance is a lenient test, it is intended to be tempered by balancing a piece of evidence’s probative value against its potential unfair prejudice.<sup>38</sup> Unfair prejudice arises when “the primary

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shown? . . . Somebody’s dead and they loved them. They mattered. They’re the only thing that matters.” *Id.*

35. Ken Little, *Bill Aims to Show Victims as More than a Corpse*, GREENVILLE SUN (June 20, 2015), [http://www.greenevillesun.com/news/local\\_news/bill-aims-to-show-victims-as-more-than-a-corpse/article\\_f6baa029-b8d3-546e-85d9-f968cfc27db7.html](http://www.greenevillesun.com/news/local_news/bill-aims-to-show-victims-as-more-than-a-corpse/article_f6baa029-b8d3-546e-85d9-f968cfc27db7.html) [<http://perma.cc/4TX5-PBUY>].

36. FED. R. EVID. 401.

37. TENN. R. EVID. 401.

38. TENN. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).



purpose of the evidence at issue is to elicit emotions of bias, sympathy, hatred, contempt, retribution, or horror.”<sup>39</sup> An evidentiary analysis of living-victim photos in homicide trials leads to the conclusion that they have little, if any, relevance. Therefore, when compared to the potential for unfair prejudice, evidentiary theory would counsel that these photos should be excluded.

This was the position that Tennessee courts took prior to the enactment of the Victim Life Photo Act, which reversed this presumption of exclusion.<sup>40</sup> Utah, Oregon, and Oklahoma similarly enacted living-victim photo acts in response to routine judicial exclusion of victim photographs at trial.<sup>41</sup> Courts in many states, however, still hold this general presumption of exclusion,<sup>42</sup> while some state courts routinely admit such photos.<sup>43</sup> Nonetheless, though there are varied precedents in states without living-victim statutes, no state has a per se inadmissibility rule.<sup>44</sup> Instead, judges in states not constrained by statute engage in the typical two-pronged approach of assessing unfair

39. *State v. Collins*, 986 S.W.2d 13, 20 (Tenn. Crim. App. 1998) (quoting MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* 182–83 (2d ed. 1986)).

40. *Compare State v. Adams*, 405 S.W.3d 641, 657 (Tenn. 2013) (living-victim photos inadmissible), with TENN. CODE ANN. § 40-38-103(c) (2015) (living-victim photos “shall be admissible”).

41. *See* OKLA. STAT. ANN. tit. 12, § 2403 (West 2003) (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . . However, in a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive.”); OR. REV. STAT. ANN. § 41.415 (West 1987) (“In a prosecution for any criminal homicide, a photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive.”); UTAH CODE ANN. § 77-38-9(7) (West 2014) (“In any homicide prosecution, the prosecution may introduce a photograph of the victim taken before the homicide to establish that the victim was a human being, the identity of the victim, and for other relevant purposes.”).

42. *See, e.g., People v. Daughtry*, 610 N.Y.S.2d 54, 54 (N.Y. App. Div. 1994) (“[P]hotographs of a victim taken while he or she is alive may arouse the jury’s emotions and, therefore, should not be admitted unless relevant to a material fact to be proved at trial.”); *Commonwealth v. Story*, 383 A.2d 155, 160 (Pa. 1978) (noting general lack of relevance of living-victim photos).

43. *See, e.g., Drane v. State*, 455 S.E.2d 27 (Ga. 1995); *State v. Aswegan*, 331 N.W.2d 93 (Iowa 1983); *State v. Walker*, 845 P.2d 1 (Kan. 1993); *Commonwealth v. Nadworny*, 486 N.E.2d 675 (Mass. 1985); *State v. Mergenthaler*, 868 P.2d 560 (Mont. 1994); *State v. Ryan*, 409 N.W.2d 579 (Neb. 1987); *State v. Brown*, 293 S.E.2d 569 (N.C. 1982); *State v. Ash*, 526 N.W.2d 473 (N.D. 1995); *State v. Bertram*, 591 A.2d 14 (R.I. 1991); *State v. Brett*, 892 P.2d 29 (Wash. 1995).

44. *State v. Broberg*, 677 A.2d 602, 608 (Md. 1996) (“We have found no jurisdiction, however, that has adopted a per se rule barring the use of ‘in life’ photographs. When appellate courts have disapproved the admission of ‘in life’ photographs, they have generally either found that the photographs were irrelevant, or that their probative value in the particular case was outweighed by their prejudicial effect.”).

prejudice as compared to probative value.<sup>45</sup> This allows judges to make individualized, discretionary determinations and vary their evidentiary rulings based on the unique circumstances of the case before them. States that have living-victim photo statutes have taken away this balancing consideration, as discussed in Section II.B.

### 1. Low Relevance

Discretion determines what gets excluded, but relevance determines initial admissibility.<sup>46</sup> Federal Rule of Evidence 401, which defines relevance, states, “Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”<sup>47</sup> Proffered evidence must be relevant, as “[n]one but facts having rational probative value are admissible.”<sup>48</sup> McCormick aptly summarizes relevance as asking whether “the evidence offered render the desired inference more probable than it would be without the evidence . . . . Relevant evidence then, is evidence that in some degree advances the inquiry, and thus has probative value, and is *prima facie* admissible.”<sup>49</sup>

Under this inquiry, therefore, relevant evidence must also be material to be admitted: that is, the fact to which the evidence points must be “of consequence.”<sup>50</sup> This materiality inquiry asks whether the fact the evidence seeks to prove is “necessary to a decision of the case before the court.”<sup>51</sup> Materiality, therefore, is distinct from the inquiry of relevancy, though a proffered piece of evidence must meet both prongs to avoid exclusion as irrelevant.<sup>52</sup>

A photo depicting a murder victim while alive often has no relevance.<sup>53</sup> Absent particularized circumstances, the image of an individual while he or she was alive does nothing to make a fact “more or less probable,” as it does not tie the defendant to the underlying

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45. *Id.*

46. *See* FED. R. EVID. 401.

47. *Id.*

48. 1 WIGMORE, EVIDENCE § 9 at 289 (3d ed. 1940).

49. MCCORMICK, EVIDENCE § 185 at 437–38 (2d ed. 1972).

50. *See id.*

51. Harry P. Thompson Jr. & Thomas J. Leitem, *Evidence Admissibility—The Common Denominator*, 31 MO. L. REV. 516, 530 (1966).

52. For a thoughtful discussion of these two prongs of relevancy and their frequent confusion, see Herman L. Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 386 (1952).

53. *See Commonwealth v. Story*, 383 A.2d 155, 160 (Pa. 1978) (noting lack of relevance).

crime.<sup>54</sup> An illustration helps explain this. Consider that at trial, the prosecution shows the portrait of a child who was allegedly killed by a neighbor—the image of that child does nothing to make it more or less likely that neighbor was responsible for the crime and does not make any material fact in the case more or less likely. The court in *Commonwealth v. Story* summed up the basic idea of relevance, stating, “[T]he [photograph] in question was totally irrelevant to the determination of appellant’s guilt or innocence. It was therefore unnecessary for the trial court to determine whether the probativeness outweighed the prejudice.”<sup>55</sup>

There are times, however, when a photo of the victim while they were alive may be relevant because it makes an issue in the case more or less probable.<sup>56</sup> For example, in *Grandison v. State*, a photograph of the victim while she was alive was relevant because the defendant allegedly committed a murder-for-hire but killed the wrong target, mistaking the victim for her sister.<sup>57</sup> In that case, the resemblance between the sister and the victim, as shown through a living photo, had relevance in the proceeding. The victim’s appearance made it more likely that the defendant had the ascribed motive, which was a material fact.<sup>58</sup> Additionally, if a defendant claims self-defense, the size and appearance of the attacker would be relevant, and a photograph of the victim while alive could show this.<sup>59</sup>

Often the purported relevance of a living-victim photograph in a homicide case is that it identifies a previously living individual who is no longer alive, and “[i]n every homicide case, the State must establish the identity of the person killed.”<sup>60</sup> However, in many cases there are crime scene photographs or testimony that have already established this fact. Therefore, any (already low) probative value is further

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54. FED. R. EVID. 401.

55. 383 A.2d at 160.

56. Even states that generally exclude living-victim photos will admit them when the image has bearing on a fact relevant to the crime. See, e.g., *Wilson v. United States*, 162 U.S. 613, 621 (1896) (finding a living picture of the deceased admissible to prove identity of victim when the dead body was very decomposed); *Commonwealth v. Scoggins*, 353 A.2d 392, 396 (Pa. 1976) (upholding admissibility of a victim of the photo while alive to corroborate testimony that the victim had a claw left arm and was, therefore, physically incapable of having attacked appellant in the manner alleged). This makes sense under traditional evidentiary doctrine, as when the photo proves or disproves a material fact in issue it has relevance.

57. 506 A.2d 580, 602 (Md. 1986).

58. *Id.*

59. See *Wilson*, 162 U.S. at 621.

60. *State v. Broberg*, 677 A.2d 602, 610 (Md. 1996).

discounted when this question is not at issue.<sup>61</sup> Additionally, if a defendant is willing to stipulate the existence and identity of the victim, the evidence's relative probative value is diminished or even eliminated—it is no longer essential to proving anything at trial and thus is not material.<sup>62</sup> Therefore, even when a living-victim photo may have a small degree of relevance, its materiality is discounted by this stipulation.<sup>63</sup> The photograph would then be cumulative and its probative value weakened, setting it up to be excluded when balanced against unfair prejudice, discussed in Section II.A.2.

Further weakening the relevance of living-victim photos is the way they are often presented at trial. Though a photo may be proffered as relevant proof of identity, the testimony elicited in connection with living-victim photos normally goes beyond mere identification.<sup>64</sup> Instead, the photos are woven into testimony to humanize and create empathy for the victim (and thereby create loathing for the defendant).<sup>65</sup> For example, in *State v. Broberg*, the trial court admitted two photographs of an eleven-year-old boy who was struck and killed by a drunk driver.<sup>66</sup> One photo was his school portrait and the other showed him in his little league uniform.<sup>67</sup> The identity of the victim was not in dispute, but under identity reasoning, the Maryland Supreme Court upheld the trial court's admission of the photos.<sup>68</sup> Further, the identity rationale was not the reasoning put forward by the state at the time of trial.<sup>69</sup> Instead, in advocating the admissibility of these photographs, the state actually argued that because "the homicide victim may be 'humanized' during the trial stage through the use of 'in life' photographs . . . the State should be allowed to offer a 'glimpse of the life [which the defendant] chose to extinguish.'"<sup>70</sup>

Similarly, in *Ritchie v. State*, the prosecution enlarged and displayed a photo of the victim on a poster board throughout the trial.<sup>71</sup>

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61. *Old Chief v. United States*, 519 U.S. 172, 191 (1997) (finding error in admission of evidence of a prior felony when the defendant stipulated to this fact and there were other, less prejudicial means available to prove the point, including a stipulation).

62. FED. R. EVID. 401.

63. See Trautman, *supra* note 52, at 386.

64. See, e.g., *Broberg*, 677 A.2d at 613–14; *Ritchie v. State*, 632 P.2d 1244, 1246 (Okla. Crim. App. 1981).

65. *Broberg*, 677 A.2d at 613–14; *Ritchie*, 632 P.2d at 1246.

66. 677 A.2d at 604.

67. *Id.*

68. *Id.* at 612.

69. *Id.* at 613 (Eldridge, J., dissenting).

70. *Id.* (internal citations and quotation marks omitted) (brackets in original).

71. *Ritchie v. State*, 632 P.2d 1244, 1246 (Okla. Crim. App. 1981).

The prosecutor then referred to the poster board when witnesses were called.<sup>72</sup> This is a far cry from the mere establishment of the victim's identity. Indeed, the appellate court, finding error, stated, "The jury should not have been concerned with what the child looked like prior to the offense committed against her . . . . The probative value of the enlarged photo is questionable and could be highly prejudicial."<sup>73</sup> On other occasions, living-victim photos have been admitted under the guise of establishing identity but were then presented to the jury in a before-and-after format, with the prosecutor comparing a photo of the smiling, living victim to a gruesome autopsy or crime scene photograph.<sup>74</sup>

As such, identity reasoning, besides positing only marginal relevance at best, is often mere pretext. When evidence is not used for the proffered purpose for which it is found admissible, its relevance can be weakened or extinguished—making otherwise relevant evidence inadmissible.<sup>75</sup> Therefore, when living-victim photos are admitted under the guise of proving identity, yet are instead used to elicit emotionally charged testimony, their marginal relevance is lessened and the relative unfair prejudice is heightened.<sup>76</sup>

Finally, in discussing living-victim photos, some scholarship has drawn false analogies to the relevance considerations of crime scene and autopsy photographs. Such photographs undergo similar 403 rigor, yet are often admitted unless unduly gruesome.<sup>77</sup> Postmortem photos, however, generally play a fundamentally different role in trial and are proffered for different reasons than are living-victim photographs, thus

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72. *Id.*

73. *Id.*

74. *See* *People v. Stevens*, 559 N.E.2d 1278, 1279 (N.Y. 1990) (criticizing the prosecution's presentation of a living-victim photo next to an autopsy photo to show a comparison); *People v. Winchell*, 470 N.Y.S.2d 835, 840–41 (N.Y. App. Div. 1983) (stating that admissibility of a crime scene photograph of the victim does not create admissibility in a living-victim portrait).

75. In *State v. Bocharski* the court determined that autopsy photographs were relevant and admitted them to show the angles of wounds; however, the prosecutor did not elicit testimony concerning the angles or their significance. 22 P.3d 43, 49 (Ariz. 2001). Thus, even though the photographs met the "bare minimum standard of relevance," because they were not used for the proffered purpose, the court concluded that "they were introduced primarily to inflame the jury." *Id.*

76. *Id.*

77. *See* Liesa L. Richter, *Evidence: Is Oklahoma Balancing the Scales of Justice by Tying the Hands of Trial Judges?: The 2002 Amendment to Section 2403 of the Oklahoma Evidence Code Mandating Admission of In-Life Victim Photographs in Homicide Cases*, 56 OKLA. L. REV. 383, 400 (2003) (arguing against differing treatment of living and postmortem photographs in homicide cases).

justifying a different outcome under a relevancy and 403 analysis.<sup>78</sup> Postmortem photographs are truly evidentiary: they go to the circumstances and cause of the crime for which the accused is on trial.<sup>79</sup> Unlike living photos, they often implicate the defendant and in many cases elucidate the circumstances of the victim's death.<sup>80</sup> In contrast, living-victim photos, absent special circumstances, reveal nothing about the nature of the crime, nor do they tie the defendant to the conduct alleged.<sup>81</sup> Thus, analogies to crime scene and postmortem photos as a justification for the admissibility of living-victim photos, though tempting, should be rejected.<sup>82</sup>

## 2. High Unfair Prejudice

Once the relevance of proffered evidence has been determined, a judge moves to the second prong of assessing admissibility—ensuring that the evidence's probative value is not substantially outweighed by its unfair prejudice.<sup>83</sup> The Rules Advisory Committee notes to Federal Rule of Evidence 403 provide guidance on the threshold of impropriety, stating, "Unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not

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78. This is not to say that gruesome crime scene photographs do not occasionally carry their own attendant risks of unfair prejudice. For a thoughtful discussion of the role and use of dead-victim photographs, see Bandes & Salerno, *supra* note 15, at 1025.

79. *E.g.*, *People v. Herrera*, 272 P.3d 1158, 1165 (Colo. App. 2012) ("Photographs of victims illustrating the appearance of the victim's body at the scene of the crime or the nature and location of the victim's injuries are generally relevant because they tend to show whether and how the offenses were committed.").

80. *See, e.g.*, *People v. Stevens*, 559 N.E.2d 1278, 1279 (N.Y. 1990) (noting that "photographs of the victim's body showed the nature of the injury and therefore tended to prove that the assailant acted with intent to inflict serious injury, an essential element of the manslaughter count"); *People v. Winchell*, 470 N.Y.S.2d 835, 839 (N.Y. App. Div. 1983) ("[T]he photographs were relevant in that they exhibited a causative factor of death, the brassiere twisted around the victim's neck, and demonstrated the inconsistency in defendant's testimony as to how he placed the body under the garage. Despite their admittedly gruesome nature, the photographs were probative of relevant issues and not presented solely to inflame the jury.").

81. *Stevens*, 559 N.E.2d at 1279 ("[T]he relevance of the portraits must be independently established; the fact that photographs of the victim after death have been found to be relevant does not necessarily establish the relevance, and hence admissibility, of portraits of the victim while alive."). *But see supra* notes 56–59 (describing circumstances in which living-victim photos have particular relevance).

82. The fundamental difference between living and postmortem photographs for evidentiary purposes is fleshed out in the pre-Victim Life Photo Act case of *State v. Adams*, 405 S.W.3d 641 (Tenn. 2013). *Id.* at 658 (holding that it was error to admit living-victim photographs while there was no abuse of discretion in allowing admission of the crime scene photos).

83. *See* FED. R. EVID. 403; TENN. R. EVID. 403.

necessarily, an emotional one.”<sup>84</sup> If the risk of unfair prejudice is significantly greater than the evidence’s probative value, then the judge should use her discretion to exclude it.<sup>85</sup> The test is balancing and relative—the amount of prejudice sufficient to outweigh the evidence’s probativeness depends on the utility that evidence provides to the evaluation of the issues in the case.<sup>86</sup> For example, the level of prejudice needed to substantially outweigh the probativeness of a murder weapon is normally going to be higher than the amount of prejudice that would lead to the exclusion of something such as flight evidence<sup>87</sup>—or, to the point, a photo of the victim while alive. It is a sliding scale of which judicial discretion is an integral part.<sup>88</sup> Trial judges are given the power and responsibility to make these determinations, balancing the oft-competing goals of accuracy, fairness, and efficiency.<sup>89</sup>

Assuming *arguendo* that a living-victim photograph meets the scant minimum requirement of relevance, it should still normally be excluded because its prejudicial nature would outweigh the exceptionally low probative value.<sup>90</sup> Because a living-victim photo’s probative value is so low, the corresponding risk of unfair prejudice need not be particularly high to properly lead to exclusion.<sup>91</sup> This is not to say that the unfair prejudice is low—quite the contrary<sup>92</sup>—but to emphasize that even a modicum of unfair prejudice should be sufficient to cause a living-victim photo to be excluded.

Though only a *low* risk of unfair prejudice would often be sufficient to warrant excluding a living-victim photo, these photographs

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84. FED. R. EVID. 403 advisory committee’s note (internal quotation marks omitted).

85. *Id.*

86. Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 567 (1984) (describing this “sliding scale” of unfair prejudice under 403). The inverse of this statement is also true. *See* *Smith v. State*, 98 A.3d 444, 453 (Md. Ct. Spec. App. 2014) (“In order to admit evidence of a highly incendiary nature, the evidence must greatly aid the jury’s understanding of why the defendant was the person who committed the particular crime charged.”).

87. Flight evidence, i.e., evidence that an alleged criminal fled from the scene of a crime or from authorities, is generally considered to be quite weak. *See* Note, *Rule 403 and the Admissibility of Evidence of Flight in a Criminal Trial*, 65 VA. L. REV. 597, 599 (1979) (“Because of the inherent ambiguity of flight evidence, however, the Supreme Court has questioned the probative value even of evidence of immediate flight.”).

88. Sharpe, *supra* note 86, at 567.

89. *See infra* notes 149–153 and accompanying text.

90. *See Ritchie v. State*, 632 P.2d 1244, 1246 (Okla. Crim. App. 1981) (finding error in admission of photograph of victim while alive under a 403 rationale).

91. Sharpe, *supra* note 86 at 567.

92. *See Ritchie*, 632 P.2d at 1246 (“The probative value of the enlarged photo is questionable and could be highly prejudicial. In a close case, on appeal, such a photograph may well tip the scales in appellant’s favor.”).

often carry quite a *high* risk of improper emotive considerations.<sup>93</sup> The Pennsylvania case of *Commonwealth v. Rivers* aptly summarized this relationship:

The existence of [the victim] as a life in being was clearly established through the testimony of various witnesses. The Commonwealth therefore did not need the photograph to establish this fact. This photograph was introduced for the purpose of engendering sympathy for the victim with the intent of creating an atmosphere of prejudice against the defendant.<sup>94</sup>

Another court noted unfair prejudice in living-victim photos, stating, “The horror of the homicide can be equally evoked with a photo of a victim who is a beautiful baby as it can be with gruesome death pictures. The emotional effect is as potentially damaging.”<sup>95</sup>

Finally, as discussed in Section II.A, living-victim photos are often submitted by the prosecution *precisely because* the state hopes that jurors will make their decision with their emotions instead of their minds.<sup>96</sup> Supreme Court dicta from Justice Souter indicates that judges at the highest level recognize the risk of unfair prejudice stemming from living-victim photos.<sup>97</sup> In his concurring opinion in *Carey v. Musladin*, Justice Souter discussed the inherent risks of allowing a victim’s photo to be displayed on buttons worn by spectators in the courtroom, noting:

[O]ne could not seriously deny that allowing spectators at a criminal trial to wear visible buttons with the victim’s photo can raise a risk of improper considerations. The display is no part of evidence going to guilt or innocence, and the buttons are at once an appeal for sympathy for the victim (and perhaps for those who wear the buttons).<sup>98</sup>

The desire to show the suffering of survivors and thus engender sympathy for those left behind was the primary, if not sole, motivation of the Tennessee Voices for Victims campaign.<sup>99</sup> Indeed, the original draft of the Tennessee Victim Life Photo Bill would have allowed the victim’s family to select the photo introduced at trial.<sup>100</sup> Allowing

93. See, e.g., *id.* (finding unfair prejudice substantially outweighed the photo’s negligible probative value); *Commonwealth v. Story*, 383 A.2d 155, 160 (Pa. 1978) (same).

94. *Commonwealth v. Rivers*, 644 A.2d 710, 716 (Pa. 1994) (citations omitted).

95. *Franks v. State*, 636 P.2d 361, 366 (Okla. Crim. App. 1981) (finding error in admission of photo of victim baby while alive). Notably, however, in the aftermath of the victim life photo legislation in that state, Oklahoma courts have retreated from this position, as discussed in Section II.B.

96. See *supra* notes 64–72 and accompanying text.

97. *Carey v. Musladin*, 549 U.S. 70, 82–83 (2006) (Souter, J., concurring).

98. *Id.*

99. See *supra* notes 29–32 and accompanying text.

100. The original draft of the bill stated that “[a] deceased victim’s family has a right to have a photograph, determined by the court to be a reasonable depiction of the victim prior to the crime, be admitted during trial.” See *Victim Life Photo Bill*, TENN. VOICES FOR VICTIMS,



prosecutors to directly appeal to the jury's emotions, which a photo selected by a bereaving family would certainly do, is precisely the type of consideration 403 seeks to eliminate from the jury box.<sup>101</sup>

The combination of living-victim photographs' low relevance, lack of materiality, and the attendant risks of substantial unfair prejudice make statutory admissibility exceedingly problematic. The motivation behind this legislation makes the use of these photos even more dubious. Such images can invoke deep emotions of sympathy and horror and have an incredible impact—which is exactly why families want them shown and why prosecutors seek to introduce them into evidence.<sup>102</sup> This same reasoning, however, is precisely why these photos should be excluded or at least left to the sound discretion of the presiding judge. This is not to say that one should not feel sadness and sympathy for the victims of violent crimes; however, it is an undisputed and well-accepted tenet of evidentiary law that these extralegal considerations should have no place in the jury box.<sup>103</sup> State-sanctioned invocations of grief and outrage that seek the sympathy of the jury go to the very heart of unfair prejudice.

#### *a. Victims are Victims: Addressing Counterarguments*

In Tennessee, victims that survive a crime have a constitutional right to attend the trial of the accused, and, by this logic, there exists a parallel argument that a photo of a homicide victim should be allowed, as it personifies a person whose life was taken.<sup>104</sup> Similar reasoning was presented for the photo provision in the Utah Victims' Rights Amendment.<sup>105</sup> One article noted:

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<http://tnvoicesforvictims.org/calendar/victim-life-photo-bill/> (last visited Jan. 10, 2016) [<https://perma.cc/T5Y7-6W8B>].

101. See Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 897 (1988) ("[T]he concerns subsumed by the concept of 'prejudice' are probative dangers that threaten to vitiate the fact-finding process itself.").

102. See *supra* notes 29–32, 64–72 and accompanying text.

103. Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements*, 10 PSYCHOL. PUB. POL'Y & L. 492, 501 (2004), <http://people.uncw.edu/myersb/292/readings/readings/victim%20impact.pdf> [<https://perma.cc/3EW5-JUFL>] ("A well-established belief among legal scholars and practitioners alike is that an emotional juror is an irrational juror.").

104. Joan Berry & Dave Clark, *Guest Column: The Last Insult*, OAK RIDGE TODAY (Mar. 23, 2015), <http://tnvoicesforvictims.org/wp-content/uploads/2014/03/The-Last-Insult.pdf> [<https://perma.cc/5733-94EV>] ("We want . . . [to give] murder victims the same rights as victims of other crimes. We want murder victims to be granted the opportunity to be present in the courtroom.").

105. Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1408 (1994).

For victims, such statements [that living photos have low probative value] exemplify the view that the criminal justice system is out of balance . . . . [D]efendants are, of course, alive and present in the courtroom to establish rapport with the jury. . . . Yet while the defendant is free to personalize his side of the case, the victim's family is not even given the satisfaction of having the prosecution introduce a photograph of the victim to personalize the life taken.<sup>106</sup>

On its face this is a compelling narrative; however, it falsely analogizes between a victim being able to be present in a courtroom and a photograph being introduced as a piece of evidence. Courts have recognized that “[i]n determining whether a jury has been unduly influenced, there is an important distinction between the potential impact of a ‘state-sponsored’ message and a message from private citizens.”<sup>107</sup> Jurors know it is the role of the judge to serve as gatekeeper and ensure they do not take in improper considerations,<sup>108</sup> therefore, allowing a living-victim photo to be admitted as evidence necessarily deems it as something to properly be considered in determining the guilt of the accused.<sup>109</sup> This is fundamentally different than an individual or family member merely being present in the courtroom. “The special influence of the imprimatur of the State is often troubling,” and its impact on the jury should not be ignored.<sup>110</sup>

The desire to “personalize the life taken,” no matter how emotionally compelling, rests on an improper evidentiary basis.<sup>111</sup> It does not take much imagination to envision how the grizzled defendant, likely brought into the room in handcuffs, juxtaposed with an admitted photo of the smiling, beautiful victim, would spur an emotional response and possibly outrage members of the jury. These improper considerations could deny the defendant a fair trial.<sup>112</sup>

Additionally, the focus on the rights of the victim as an impetus for this type of legislation misconstrues the very nature of criminal proceedings.<sup>113</sup> This observation is not to undermine the trauma or

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106. *Id.*

107. *State v. Lord*, 165 P.3d 1251, 1254 (Wash. 2007).

108. *Id.*

109. *Id.*

110. *Id.*; see also N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 PSYCHOL. PUB. POLY & L. 1, 1 (2009) (finding that mock jurors were less critical in their evaluations of scientific evidence when it was “admitted” by a judge than when presented with the same evidence outside of the trial context).

111. *Id.*

112. See *infra* notes 198–203 and accompanying text.

113. *Payne v. Tennessee*, 501 U.S. 808, 836 (1991) (Souter, J., concurring) (“Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation.”).

tragedy of victims of violent crimes, but instead recognizes the larger role of the criminal justice system—a criminal trial is not for the vindication of individuals, but for society. Victims play a role in this, but they are not parties to the trial—the defendant’s opponent is the State.<sup>114</sup> And finally, though the victims and survivors have been impacted by the crime and the trial, the state has a duty to ensure due process for the defendant—not the victim.<sup>115</sup>

This tension between fairness to the defendants and victims’ rights has fleshed itself out in the role of victim impact statements in the sentencing phase of trials. The Supreme Court notably reversed its position on the Eighth Amendment barring such testimony in *Payne v. Tennessee* in 1991.<sup>116</sup> Though much scholarly attention was paid to the Supreme Court’s top-down reversal of its position on victim impact statements,<sup>117</sup> the bottom-up grassroots push for victim photos in the guilt phase of murder trials has been largely overlooked. Living-victim-photo legislation at the state level has (thus far) gone far less noticed.<sup>118</sup> The success of the victims’ rights movement in obtaining admissibility of these photographs could be even more problematic than victim impact statements. Unlike the latter, living-victim photographs are introduced as substantive evidence during the guilt phase of a homicide trial before the defendant has been convicted.<sup>119</sup> Often the testimony elicited in connection with these photos forays beyond identity, as discussed in Section II.A.1. The converse is also true—research suggests that many jurors use victim evidence from the guilt phase of a capital trial to determine what punishment is appropriate in the trial’s

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114. Myers & Greene, *supra* note 103, at 493 (discussing how victim impact statements are inconsistent with the “notion that crime is a violation against the state rather than against individual victims”).

115. See, e.g., Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, HARV. J.L. & PUB. POL’Y 357, 371–72 (1986) (noting the American “public prosecution” model in which the criminal justice system serves the interests of society, not individual victims); see also Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (“[A] citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. . . . [I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”).

116. 501 U.S. at 830 (reversing *Booth v. Maryland*, 482 U.S. 496 (1987), and allowing victim impact statements during the sentencing phase of trials).

117. See, e.g., Roscoe Porter Field, *Constitutional Law—Payne v. Tennessee: The Admissibility of Victim Impact Statements—A Move Toward Less Rational Sentencing*, 22 MEM. ST. U. L. REV. 135, 156 (1991).

118. But see Richter, *supra* note 77, at 383.

119. See, e.g., *Coddington v. State*, 142 P.3d 437, 451 (Okla. Crim. App. 2006) (upholding admission of a living-victim photograph during guilt stage of trial under Oklahoma victim photo statute).

sentencing phase.<sup>120</sup> Therefore, the picture painted (or shown) of the victim during trial can be the difference between life and death for the defendant.<sup>121</sup>

This has significant implications, as there is research indicating that defendant and victim attractiveness (or lack thereof) and race can have a substantial impact on jury perception and the ultimate verdict of a trial.<sup>122</sup> Allowing the prosecution (and the prosecution only<sup>123</sup>) to introduce these photos *carte blanche* enables one side to play up these inherent, improper biases and exacerbate such systemic imbalances. Justice Stevens acknowledged these biases in his dissent in *Payne*, stating:

The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support . . . . Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others. Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white, but to accept a plea bargain if the victim is black.<sup>124</sup>

This is reified when one takes into consideration that there are currently 2,922 inmates on state death rows<sup>125</sup> while there are only sixty-two federal death row inmates.<sup>126</sup> In 2014, there were a combined 694 homicides in the four states that currently have living-victim photo statutes—Oklahoma, Oregon, Utah, and Tennessee—with over half of these homicides occurring in Tennessee.<sup>127</sup> All four of these states retain

120. Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worth and Unworthy Victims*, 88 CORNELL L. REV. 343, 371 (2003). Juries are typically only involved in sentencing in capital trials; therefore, though they do not take part in all sentencing, they are involved in the most high-stakes decisions.

121. *See id.* at 373 (finding the “victim factor” to play a significant role in capital sentencing decisions).

122. *See, e.g.*, David L. Wiley, *Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials*, 27 ST. MARY'S L.J. 193, 211 (1995) (“Physical appearance discrimination plays a substantive and all-too-frequent role in American criminal trials.”); *see also* Marsha B. Jacobson, *Effect of Victim's and Defendant's Physical Attractiveness on Subject's Judgments in a Rape Case*, 7 SEX ROLES 247, 253 (1981) (finding a simulated jury more likely to convict an alleged rapist when the victim is attractive).

123. Every state that has enacted a living-victim photo statute extends preferential treatment only to photographs offered by the prosecution. A defendant may still be able to admit a photograph of the victim under traditional evidence rationales, but cannot take advantage of the permissive statute—thus defendants have to meet a higher threshold.

124. *Payne v. Tennessee*, 501 U.S. 808, 866 (1991) (Stevens, J., dissenting).

125. *Death Row Inmates by State*, DEATH PENALTY INFO. CTR. (July 1, 2015), <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> [<https://perma.cc/CL6X-6T8Z>].

126. *Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR. (June 26, 2015), <http://www.deathpenaltyinfo.org/federal-death-row-prisoners> [<https://perma.cc/QWB9-XLF3>].

127. *Uniform Crime Reports: 2014 Crime in the United States*, FBI, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-4> [[perma.cc/5J88-](https://perma.cc/5J88-)].

the death penalty.<sup>128</sup> Therefore, changes to the evidentiary code at a state level to allow further focus on the victim, particularly for traditional state crimes like homicide, should cause concern. The lesser attention paid to these changes, however, could mean that these bills are easier to enact and do not receive the proper pushback.<sup>129</sup> This is an area in which concerns about fundamental fairness for defendants in criminal trials must supersede notions of victims' rights.

### *B. Dabbling with Discretion*

The Tennessee Victim Life Photo Act, like similar acts, has two primary evidentiary consequences: (1) it declares that living-victim photos of victims in homicides are relevant and thus pass 401 muster, and (2) it exempts these photographs from the traditional 403 balancing.<sup>130</sup>

This section examines the consequences of this and similar legislation on admissibility and discretion. First, this section demonstrates that the plain legislative intent of victim photo statutes is to eliminate discretion via 403 balancing as to admissibility of living-victim photos. Second, this section uses the implementation of such legislation in Oklahoma to demonstrate that even when judges interpret these statutes to preserve discretionary 403 balancing, the inquiry is toothless and creates a realm of 403 purgatory in which living-victim photos are almost never excluded.

#### 1. Intended Effect: 403 Elimination

It is clear that the Tennessee legislature passed the Victim Life Photo Act with the intent of eliminating 403 balancing considerations as to living-victim photos.<sup>131</sup> This position is in accord with the position of Tennessee Voices for Victims, the group that lobbied for the bill's

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DC94] (last accessed Feb. 28, 2016) (showing "murder and nonnegligent homicide[s]" with 371 in Tennessee, 175 in Oklahoma, 81 in Oregon, and 67 in Utah).

128. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [https://perma.cc/D8C4-QPBB] (last accessed Feb. 28, 2016). In the aftermath of a high-profile botched execution, Oklahoma prisoners facing the death penalty (including the defendant in *Glossip v. State*, 157 P.3d 143, referenced in this Note) challenged that state's death penalty by lethal injection; however, its legality was upheld by the Supreme Court last term. See *Glossip v. Gross*, 135 S. Ct. 2726, 2746 (2015).

129. See *supra* notes 116–118 and accompanying text.

130. See TENN. CODE ANN. § 40-38-103(e) (2015); TENN. GEN. ASSEMB. FISCAL REV. COMM., FISCAL NOTE, SB 166 (2015), <http://www.capitol.tn.gov/Bills/109/Fiscal/SB0166.pdf> [https://perma.cc/S2BY-ER2C].

131. Fiscal Note, SB 166.

enactment, and is further shown through legislative history and the statute's mandatory language. Statements by bill supporters in the legislature<sup>132</sup> as well as legislative committee reports reveal that state legislators expected this bill's passage to make victim photos admissible not subject to judicial discretion.<sup>133</sup>

The report from the legislative Fiscal Committee regarding the Victim Life Photo Act stated: "Under current law and rules of evidence, a pre-crime photograph of a victim could be admitted into evidence if the photograph is relevant and not overly prejudicial. A judge has discretion over whether or not to admit the photograph."; however, "[t]he proposed legislation would *require* the admission of a pre-crime photograph if the victim is dead."<sup>134</sup> The language is clear—it acknowledges that the prior discretion was a problem and states that the purpose of the legislation is to require that these photos be admitted. This shows plain legislative intent that these photos no longer be subject to discretionary 403 balancing.<sup>135</sup>

Additionally, the *Tennessee Criminal Practice Guide* has been updated to reflect the new state of the law on living-victim photographs.<sup>136</sup> It now reads: "With regard to a photograph of the victim of a homicide taken while the victim was alive, the legislature has specifically authorized the admissibility of 'an appropriate photograph of the victim' in a prosecution for any criminal homicide."<sup>137</sup> The legislature, therefore, has made clear that the Act creates admissibility of living-victim photos, wholly eliminating the exercise of judicial discretion under 403. Instead, the legislature has made living-victim photographs per se admissible.<sup>138</sup>

Interpretation of the Tennessee Victim Life Photo Act as creating per se admissibility of these photographs is in line with other states that adopted similar provisions prior to Tennessee doing so.<sup>139</sup>

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132. Rep. Rep. Ryan Haynes, co-sponsor of the bill, stated: "I don't see any reason why an individual should not be able to have a photo of the victim introduced into evidence. That doesn't seem to me to be a problem at all." Stephanie Beecken, *Murder Victim's Mother Pleased as Victim Photo Bill Moves Forward in Tenn. Legislature*, WATE 6 (Mar. 25, 2015), <http://wate.com/2015/03/25/murder-victims-mother-pleased-as-photo-bill-moves-forward-in-tenn-legislature/> [<https://perma.cc/Y6HZ-A3GR>].

133. TENN. GEN. ASSEMB. FISCAL REV. COMM., *supra* note 130.

134. *Id.* (emphasis added).

135. *Id.*

136. W. MARK WARD, TENNESSEE CRIMINAL TRIAL PRACTICE § 22:19 (2015–2016 ed. 2015) (discussing unfair prejudice).

137. *Id.*

138. Indeed, the Oregon Supreme Court came to this conclusion in interpreting its version of the Victim Life Photo Act. *See State v. Williams*, 828 P.2d 1006, 1012 (Or. 1992).

139. *Id.*

The Oregon Supreme Court, analyzing that state's statute, held, "The statute, in effect, declares the photographs to be relevant and not subject to balancing under [Rule] 403."<sup>140</sup> The court noted the significant, nondiscretionary nature of the word "shall" in the statute.<sup>141</sup> It held that use of the word "shall" mandated inclusion of the evidence without a discretionary 403 balancing process that would otherwise apply.<sup>142</sup> Therefore, the Oregon Supreme Court has openly acknowledged that there is now a rule of per se admissibility for photographs of victims while they were alive.<sup>143</sup>

Now, instead of judges having the ability to make determinations based on the factual circumstances of the case before them, the photo's admissibility is legislatively predetermined. There are significant institutional competency problems with evidentiary determinations being made by legislators.<sup>144</sup> Mandated admissibility of in-life photographs can be seen as a "reassertion of legislative power in this traditionally and structurally judicial space."<sup>145</sup> However, courts have generally deferred to the legislative judgment of lawmakers as a justification for "constricting its own 403 review."<sup>146</sup> In the Oklahoma case of *Marquez-Burrola v. State*, for example, the Court stated, "Appellant claims the amendment was a political move to appease victims' rights advocates. This may be true, yet Appellant offers no authority suggesting that a statute's constitutionality hinges on the politics behind it."<sup>147</sup> The admission of the in-life photograph was upheld pursuant to the statute.<sup>148</sup>

This is a dangerous situation for defendants, as there exists a substantial risk of unfairness to parties when judicial discretion is eliminated from a courtroom.<sup>149</sup> Professor Edward Imwinkelried noted this danger, stating, "It is imperative that any body of Evidence law accord the trial judge a significant measure of discretion in applying the

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*; see also *State ex rel. Carlile v. Frost*, 956 P.2d 202, 208 (Or. 1998) (stating that "[t]he statute, in effect, declares the photographs to be relevant and not subject to balancing under OEC 403").

144. See Rosanna Cavallaro, *Federal Rules of Evidence 413-415 and the Struggle for Rulemaking Preeminence*, 98 J. CRIM. L. & CRIMINOLOGY 31, 56 (2007) (finding that Congress has the ability to amend and create rules of evidence, but should refrain out of comity).

145. *Id.* at 37.

146. *Id.* at 70.

147. *Marquez-Burrola v. State*, 157 P.3d 749, 760 (Okla. Crim. App. 2007).

148. *Id.*

149. Imwinkelried, *supra* note 10 at 289.

Rules.”<sup>150</sup> This is because rulemakers, particularly nonjudicial rulemakers, cannot anticipate the varied factual exigencies presented in each case.<sup>151</sup> A judge should be able to make case-by-case determinations and “adapt the evidentiary rules to the case as it unfolds in her courtroom.”<sup>152</sup> That is why discretion is viewed as “an indispensable tool of the law of evidence.”<sup>153</sup> Its elimination, therefore, should not be taken lightly.

## 2. Actual Effect: 403 Purgatory

Although the purpose of living-victim photo statutes is to eliminate judicial discretion, the actual effect in many cases has been for judges to uniformly admit these photographs but insist that they *maintain* discretion to exclude them. This concept is operationalized here as “403 Purgatory.”

Similar to Oregon’s victim photo statute, the Tennessee and Oklahoma statutes employ the mandatory “shall be admissible” language, clearly indicating per se admissibility without 403 balancing, while the Utah statute states a photograph “may” be introduced.<sup>154</sup> A notable difference between the Utah and Oregon statutes and the Tennessee and Oklahoma statutes is that the latter two states caveat that “an *appropriate* photograph of the victim” will be admissible when offered by the prosecution in a homicide case.<sup>155</sup> The Oregon and Utah statutes do not include the “appropriate” language.<sup>156</sup> This slight, yet important, difference creates the additional risk of “403 purgatory.”<sup>157</sup> The concept of 403 purgatory recognizes that in assessing whether a photograph is “appropriate,” judges may purport to exercise discretion under the statute but consistently admit the proffered evidence without meaningfully engaging in a 403 analysis.<sup>158</sup>

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150. *Id.*

151. *Id.*; see also Cavallaro, *supra* note 144, at 55–56.

152. Imwinkelried, *supra* note 10, at 289.

153. *Id.*

154. See *supra* note 3.

155. TENN. CODE ANN. § 40-38-103(c) (2015) (emphasis added); OKLA. STAT. ANN. tit. 12, § 2403 (West 2003) (same).

156. See *supra* note 3.

157. The term 403 purgatory, coined by the author, references the idea of an intermediate state after physical death, but before entering paradise—what *Encyclopedia Britannica* terms “postmortem suffering short of everlasting damnation.” *Purgatory*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/topic/purgatory-Roman-Catholicism> (last visited Feb. 27, 2016) [<https://perma.cc/F3PH-Y784>].

158. The same risk likely exists with the use of “may” in the Utah statute; however, the author has not been able to find a single case in which the Utah statute has been invoked.



Unlike Oregon, Oklahoma decisions in the aftermath of that state's living-victim photo act have claimed that trial courts retain the discretion to exclude living-victim photographs for unfair prejudice under traditional 403 considerations.<sup>159</sup> Oklahoma courts have held "[t]he requirement that such photographs be 'appropriate' preserves the trial court's discretion in determining admissibility."<sup>160</sup> The very case that articulates this rule, however, notably allows admission of a living-victim photograph that likely engendered substantial unfair prejudice.<sup>161</sup>

In that case, *Marquez-Burrola v. State*, a husband was accused of murdering his wife in a fit of jealous rage.<sup>162</sup> At his trial, the prosecution introduced a seventeen-year-old photograph of the victim in her wedding gown on her wedding day.<sup>163</sup> The prosecution elicited testimony from the victim's (and defendant's) daughter to introduce the photo and had her attest that it was indeed the victim, her mother.<sup>164</sup> Despite the prejudicial nature of the photograph and its having little to no relevance,<sup>165</sup> the Oklahoma Court of Criminal Appeals upheld the trial court's decision stating, "the photograph at issue did not unfairly evoke sympathy for the victim so much as it underscored the tragic nature of this crime for all involved."<sup>166</sup> "The lady doth protest too much, methinks."<sup>167</sup>

In another Oklahoma case, *Hogan v. State*, the defense similarly challenged the admission of a graduation photo of the twenty-one-year-old female victim, noting that at the time the crime occurred, living-victim photos were consistently excluded by Oklahoma courts.<sup>168</sup> The court rejected this argument, stating that in the interim the Oklahoma legislature had enacted Oklahoma's living-victim photo statute, and therefore the "in-life" photo should be admitted.<sup>169</sup> The defendant was sentenced to death, and he was executed by lethal injection on January

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159. *Marquez-Burrola v. State*, 157 P.3d 749, 761 (Okla. Crim. App. 2007).

160. *Id.* at 760.

161. *Id.*

162. *Id.* at 758.

163. *Id.* at 759.

164. *Id.* at 761.

165. *Id.* at 767 (noting "[t]he evidence of a design to effect death was straightforward and considerable").

166. *Id.*

167. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2.

168. *Hogan v. State*, 139 P.3d 907, 930 (Okla. Crim. App. 2006).

169. *Id.* (finding that the Ex Post Facto Clause is not violated by the application of a new evidentiary rule in a capital trial for a crime committed before the evidentiary change and that it was not excluded under 403).

23, 2014.<sup>170</sup> The court, by using the statute as the foundation for its reasoning, showed that the decision flowed from the legislative mandate and not from careful, balanced consideration of relevance and prejudice.<sup>171</sup> This reinforces that, although the Oklahoma courts claim to maintain 403 balancing discretion, traditional evidentiary tenets do not actually underlie their decisions to admit such photographs—indeed in *Hogan* there is almost no critical analysis of probative value or unfair prejudice.<sup>172</sup>

Oklahoma's claim that trial court judges retain the discretion to exclude living-victim photographs for unfair prejudice under traditional 403 considerations does not reconcile with reality. Almost all of the state's criminal cases excluded living-victim photos under 403 before the statute went into effect, yet after its enactment these photos are consistently admitted.<sup>173</sup> This 403 purgatory—legislative mandate of admissibility but purported judicial preservation of 403—is consistent with the general confusion that ensues when 403 is eliminated or cabined by legislative decree.<sup>174</sup> A similar result has been observed at the federal level with the enactment of Federal Rules of Evidence 413–415, permitting admissibility of similar acts as evidence in crimes of sexual assault despite Rule 404(b).<sup>175</sup> There, likewise, “court[s] struggle to integrate the similar acts rules with 403,”<sup>176</sup> particularly as discretionary admissibility of evidence is an area “ordinarily governed by a judicially determinable inquiry about relevance, probativeness, and prejudice.”<sup>177</sup> Now, like with past sexual misconduct, there is a “presumption of probativeness” with victim photographs that “skews

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170. See *Hogan v. Trammell*, 511 F. App'x 769, 776 (10th Cir. 2013) (upholding Hogan's death penalty conviction); Justin Juozapavicius, *Kenneth Eugene Hogan Executed; Convicted in 1988 Stabbing Death*, HUFFINGTON POST (Jan. 23, 2014), [http://www.huffingtonpost.com/2014/01/23/kenneth-eugene-hogan-exec\\_n\\_4655364.html](http://www.huffingtonpost.com/2014/01/23/kenneth-eugene-hogan-exec_n_4655364.html) [<https://perma.cc/9U3R-Z6K8>] (discussing the execution).

171. *Hogan*, 139 P.3d at 930–31.

172. *Id.*; see also *Glossip v. State*, 157 P.3d 143, 157 (Okla. Crim. App. 2007) (upholding admission of an in-life photograph of the victim, stating simply, “[t]he photograph met the guidelines of the statute, and its probative value was not substantially outweighed by the danger of unfair prejudice”).

173. *Glossip*, 157 P.3d at 143; *Hogan*, 139 P.3d at 931 (upholding admission of a photo of the victim at his high school graduation).

174. See Cavallaro, *supra* note 144, at 65–66 (noting courts' uncertainty in applying 403 to prior evidence of sexual misconduct which was made admissible under the Federal Rules by Congress, similar to the photo statutes here).

175. *Id.* at 36; see also FED. R. EVID. 404 (banning past “crimes or other acts” to show action in accord on this occasion).

176. Cavallaro, *supra* note 144, at 36.

177. *Id.* at 40.

the 403 balance” with no more justification than that the legislature promulgated a rule.<sup>178</sup> It is as if Oklahoma courts decided overnight that such photos magically no longer carry a risk of unfair prejudice, though they held the opposite position for decades.<sup>179</sup>

\* \* \*

Under living-victim photo statutes, trial judges feel compelled to confront different situations in the exact same manner, whether under the guise of 403 or not: carte blanche admissibility. Absent intervention, Tennessee, whose statute is nearly identical to Oklahoma’s, will likely see the same result.<sup>180</sup> Tennessee’s state legislature made clear its desire to have these photos admitted under the statute.<sup>181</sup> Further, even if judges engage in a strained reading of the statute to preserve a specter of 403 balancing, evidence indicates that living-victim photographs will likely overwhelmingly be admitted.<sup>182</sup> Whether by legislative history, the language of the rule itself, or by the confusion created by the limitation on discretionary 403 balancing, Tennessee is poised to move toward automatic admissibility of victim photos to the detriment of considerations of fairness and verdict efficacy.

### III: SOLUTION: USE IT OR LOSE IT

There are two options: either discretion has been preserved and judges reviewing admissibility of living-victim photos should meaningfully employ 403, or these statutes have eliminated discretion, mandated admissibility, and should be invalidated as unconstitutional.

#### *A. Use it: Judicial Assertion of Meaningful Discretion*

One solution is for judges to meaningfully apply relevance and 403 unfair prejudice considerations, even in the face of a Victim Life Photo statute. However, experience indicates that this approach can be

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178. *Id.* at 67 (discussing this tilt in the context of rules 413–415).

179. *See, e.g.,* *Franks v. State*, 636 P.2d 361, 366 (Okla. Crim. App. 1981) (holding the living-victim photo had low relevance that was outweighed by unfair prejudice).

180. Though their preambles differ, the operative language of the statutes is the same: “[I]n a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive.” OKLA. STAT. ANN. tit. 12, § 2403 (West 2003); TENN. CODE ANN. § 40-38-103(c) (2015).

181. *See supra* notes 131–135 and accompanying text.

182. *See supra* notes 159–160, 173–179 and accompanying text.

confusing and unworkable for judges. It also carries the particular risk of 403 purgatory.<sup>183</sup>

Several defendants in Oklahoma have appealed criminal convictions by challenging the constitutionality of that state's Victim Life Photo Act.<sup>184</sup> These challenges, however, have been unsuccessful, largely due to Oklahoma courts' insistence that they have preserved 403 balancing.<sup>185</sup> The courts assert that, hypothetically, a trial court can still exercise discretion in admission of living-victim photographs.<sup>186</sup> As discussed in Section II.B, however, the courts do not meaningfully exercise this discretion and instead mechanically admit the photos in accordance with the statute.

Therefore, for this to be a true solution, the preservation of discretion must be in both word and deed. To avoid 403 purgatory, Tennessee and states with similar statutes must subject proffered photographs to a complete relevance and 403 analysis to ensure fairness to criminal defendants. This would, however, require judges to circumvent the statute's mandatory language (and clear legislative intent) to allow complete exclusion of in-life photos when he or she finds substantial unfair prejudice. No state with such a statute has thus far demonstrated a baseline of complete exclusion.

There is, however, a chance that judges in Tennessee will meaningfully preserve their discretion, even in light of contrary statutory intent. When confronted with a similar statute purporting to affect evidentiary rules, the Tennessee Supreme Court went out of its way to read the legislation so as not to infringe on judicial discretion:

If strictly construed, [this law] would represent a legislative attempt to remove a judge's discretion to determine what evidence is logically or legally relevant to an ultimate fact of consequence. Moreover, to the extent that a strict interpretation of the statute's mandatory language would preempt Rules of Evidence 401, 402, and 404(b), the statute would work to undermine, rather than to supplement, judicial determinations of logical and legal relevancy. Nevertheless, . . . we will not lightly presume that the legislature intended to usurp the role of the courts in exercising the judicial power of the state. Indeed, because we give all legislative enactments a strong presumption of constitutionality, we will presume that the legislature did *not* intend to infringe upon the

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183. See *supra* notes 174–179 and accompanying text; see also Cavallaro, *supra* note 144 (discussing the judiciary's struggle in the application of 403 to determining admissibility of past instances of sexual assault under rules 413–415).

184. *Bosse v. State*, 360 P.3d 1203, 1225 (Okla. Crim. App. 2015); *Marquez-Burrola v. State*, 157 P.3d 749, 760 (Okla. Crim. App. 2007).

185. See, e.g., *Bosse*, 360 P.3d at 1225 (“We have previously rejected these claims, specifically finding that the balancing test remains and applies to this clause after the statute was amended to permit this type of evidence.”).

186. *Id.*

proper exercise of the judicial power in this state and that therefore, it did not intend for courts to strictly construe this statute.<sup>187</sup>

Thus, there is a possibility that Tennessee judges will take a similar approach to the Victim Life Photo Act, especially because Tennessee courts, like most courts, construe statutes to avoid a constitutional conflict when possible.<sup>188</sup>

Assertion of judicial discretion as a solution could expand beyond pure exclusion. If a judge chooses to admit a proffered photograph, careful attention to the mechanisms by which these photos are introduced and the ways in which juries are instructed to use them could also mitigate unfair prejudice even in light of admissibility. For example, judges could restrict the introduction of photographs by victims' family members testimony, as was the case in *Marquez-Burrola*.<sup>189</sup> While this cuts against the underlying motivation for the statute, the rights of the victims and their families, it could temper improper emotional fervor within the jury. Another option would be for judges to allow introduction of these photos purely for identification purposes. This could mirror other evidence rules that allow otherwise impermissible evidence to be admitted for a limited purpose, such as the use of past criminal convictions to demonstrate witness credibility (but not action in accord).<sup>190</sup> Instructing the jury that the photograph should be used purely for identification purposes, however, presents at least two problems. First, there is abundant evidence indicating that fact-finders are largely incapable of making these nuanced distinctions of permissible and impermissible uses of evidence.<sup>191</sup> Second, a jury instruction pinpointing the proper use of a living-victim photo could unwittingly draw *additional* attention to its admission.

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187. *State v. Mallard*, 40 S.W.3d 473, 483 (Tenn. 2001) (citations omitted).

188. *Marion Cty. Bd. of Comm'rs v. Marion Cty. Election Comm'n*, 594 S.W.2d 681, 684–85 (Tenn. 1980) (finding that when (1) a statute can legitimately be construed in various ways, and (2) one of those constructions presents a constitutional conflict, then “[i]t is our duty to adopt a construction which will sustain the statute and avoid [that] constitutional conflict, if its recitations permit such a construction”).

189. *Marquez-Burrola*, 157 P.3d at 761; *see supra* notes 162–164 and accompanying text.

190. *See* FED. R. EVID. 404 (barring propensity reasoning); FED. R. EVID. 609 (allowing evidence of past criminal convictions for witness impeachment).

191. *See, e.g.,* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1389 (2009) (using data to show the “historical basis for allowing prior record evidence—to challenge the defendant’s credibility—has little empirical support,” and juries use this information as impermissible propensity reasoning); Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 20–21 (1988) (noting the inflammatory nature of evidence of prior convictions, even if supposedly only used for credibility).

Ultimately, these suggestions as to excluding, limiting, and controlling the way that the photographs are used implicate the necessity of the judicial discretion—discretion that these statutes sought to eliminate. The latitude and flexibility that discretionary, traditional rules of evidence grant to trial judges, however, are not only desirable, but are “indispensable tool[s] of the law of evidence”<sup>192</sup> that are necessary to ensure defendants receive a fair trial. Thus, if discretion can be resurrected it would provide a tenable solution.

*B. Lose it: Victim Life Photo Statutes are Unconstitutional*

Alternatively, Tennessee courts should determine that the Victim Life Photo Act mandates admissibility and eliminates judicial discretion, and thus unconstitutionally violates defendants’ due process rights.

The courts have an “essential duty . . . to ascertain and carry out the legislature’s intent without unduly restricting or expanding a statute’s coverage beyond its intended scope.”<sup>193</sup> Further, this “legislative intent is to be ascertained from the plain and ordinary meaning of the statutory language used.”<sup>194</sup> In Tennessee, examination of the history and language of Victim Life Photo Act reveals that plainly there is no legitimate intent to preserve 403 balancing concerns and judicial discretion—the Act was expressly meant to *eliminate* judicial discretion as to admissibility of living-victim photos. As one cannot reasonably construe the statute to preserve the judicial discretion through 403 balancing, the statute is constitutionally invalid and should be struck down as violative of due process.<sup>195</sup>

In the context of judicial review of criminal trials, due process can be mushy, but at its core, due process seeks to ensure that proceedings are fundamentally fair to a defendant.<sup>196</sup> As Justice Cardozo wrote, “Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept . . . . What is fair in one set of circumstances may be an act of tyranny in others.”<sup>197</sup> This has particular salience in criminal law, because “as applied to a

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192. Imwinkelried, *supra* note 10, at 289.

193. State v. Mallard, 40 S.W.3d 473, 480 (Tenn. 2001).

194. *Id.* (citing Gragg v. Gragg, 12 S.W.3d 412, 415 (Tenn. 2000)).

195. Notably, however, a Due Process challenge will likely only be effective if 403 balancing considerations are held *not* to apply. See United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1988) (“[S]ubject to the protections of Rule 403, Rule 413 did not violate the Due Process Clause.”).

196. *Id.*

197. Snyder v. Massachusetts, 291 U.S. 97, 116, 117 (1934).

criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.”<sup>198</sup> Therefore, admission of evidence can violate due process even if it is not false, because “[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false.”<sup>199</sup>

Violations of due process have been found when the prejudicial effect of a piece of evidence substantially outweighs its probative value.<sup>200</sup> Additionally, there may be a due process violation when clearly irrelevant evidence is admitted.<sup>201</sup> Either of these situations is arguably the case in many instances with living-victim photos of victims.<sup>202</sup> Further, the attendant risks of being convicted based on improper or emotive considerations implicate fundamental fairness, the animating principle of due process.<sup>203</sup> The introduction of a living-victim photo might not rise to the level of a due process violation in *all* instances, but where admissibility is mandated by statute, the discretion of a judge to make the ex-ante determination that a photo is fundamentally unfair is eliminated. Therefore, by making mandatory admissibility apply in all instances, these statutes ensure that in at least some instances rights will be violated. By tying the hands of judges, these states are making a drastic, dangerous overcorrection to a perceived problem.

### CONCLUSION

The victims’ rights movement has slowly crept into the guilt phase of homicide trials through the enactment of statutes that mandate admissibility of photos of murder victims while they were alive. By seeking to fix a perceived injustice to the surviving families of homicide victims, legislators have jeopardized the due process of defendants, and thus the viability of these laws, by creating blanket

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198. *Lisenba v. California*, 314 U.S. 219, 236 (1941).

199. *Id.*

200. *See* *Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988) (granting habeas relief where prejudicial effective evidence so outweighed probative value that result was a denial of fundamental fairness); *Osborne v. Wainwright*, 720 F.2d 1237 (11th Cir. 1983) (reversing and remanding a denial of habeas corpus petition on basis that prejudicial effect of evidence could have risen to fundamental unfairness); *Bisaccia v. Att’y Gen. of N.J.*, 623 F.2d 307 (3d Cir. 1980) (same).

201. *Estelle v. McGuire*, 502 U.S. 62, 70 (1991) (“Concluding, as we do, that the prior injury evidence was relevant to an issue in the case, we need not explore further the apparent assumption of the Court of Appeals that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial.”).

202. *See supra* Section II.A.

203. *Id.*

rules that apply in all situations. Those 403 analyses carried out under the specter of Victim Life Photo Acts do not truly address questions of probativeness and unfair prejudice. Instead, in these instances, judges frequently defer to the decisions of absent legislators who have appeased their constituents and turned to their next crusade. It is the judge's role to be the gatekeeper of evidence, and thus, judges should exercise their power to declare that these laws are in violation of due process.

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