

Indiana University - Purdue University, Columbus

From the Selected Works of Mary Margaret - Giannini

November 2, 2007

Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims' Rights Act

Mary Margaret Giannini



Available at: https://works.bepress.com/mary_margaret_giannini/1/

**EQUAL RIGHTS FOR EQUAL RITES?:
VICTIM ALLOCATION, DEFENDANT ALLOCATION,
AND THE CRIME VICTIMS' RIGHTS ACT**

MARY MARGARET GIANNINI*

“[T]he defendant, personally, [should] have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.”¹

“[E]very victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to the court to seek justice. When the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant’s crime be allowed to speak.”²

ABSTRACT

The federal Crime Victims’ Rights Act (CVRA) grants victims the right to be reasonably heard at sentencing. In the course of examining this right, courts and commentators have

* Visiting Professor of Law, Indiana University School of Law-Indianapolis, 2006-2008. Career Clerk, Judge Stephanie K. Seymour, Tenth Circuit Court of Appeals, 2002-2006. J.D., 2002 Indiana University School of Law – Indianapolis; M.L.S., 1993, State University of New York at Albany; M.A., 1992, University of St. Andrews, Scotland. I would like to thank my colleagues Tom Wilson and Mary Mitchell for their friendship and support throughout this project; my student assistants Rozyln Fulgoni-Britton and Raio Krishnayya for their able research assistance and editing skills; and **[who else]**. Thanks are also due for the comments and suggestions I received from fellow attendees at the Second Annual Big Ten Aspiring Scholar’s Conference, Bloomington, Indiana, August 2007, at which an earlier phase of this paper was presented. [Additionally, I extend thanks to Richard Bierschbach, Karen Bravo, Joseph Hoffman, Kimberly Thomas, Michael O’Hear, and **who else** for their willingness to read and comment upon this piece.] In the end, however, any errors or omissions are my responsibility alone.

¹ United States v. Green, 365 U.S. 301, 304 (1961).

² PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 77 (1982), available at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcprpt/welcome.html> (last visited August 25, 2007) (hereafter TASK FORCE).

referenced the defendant’s analogous right of sentencing allocution as a model or benchmark for the victim’s sentencing right. However, beyond the invocation of the defendant’s corollary right, there has been little analysis of whether defendant allocution does in fact serve as a model for victim allocution. This piece examines with particularity how victim allocution under the CVRA is currently being practiced in the federal courts, and how that practice compares to defendant allocution. The article reveals that the driving goals and purposes for victim allocution focus primarily on providing victims with the opportunity for empowerment and personal transformation through their participation in the ritual of sentencing. Conversely, defendant allocution is justified primarily for the mitigating effect it may have on a defendant’s sentence, while the restorative or humanizing benefits which may be afforded to the defendant through the rite of allocution are de-emphasized. In response to this disparity, this article contends that allocution for both victims and defendants should be grounded in the transformative power of the ritual of sentencing, rather than being limited to merely a mitigating function.

TABLE OF CONTENTS

I. INTRODUCTION

II. THE VICTIMS’ RIGHTS MOVEMENT

III. THE CRIME VICTIMS’ RIGHTS ACT (CVRA)

IV. VICTIM ALLOCUTION UNDER THE CVRA

 A. The goals of victim allocution

 B. A relevancy theory for victim allocution

 C. A rite based theory for victim allocution

 D. The correction of victim allocution denials

V. DEFENDANT ALLOCUTION

 A. The common law history of defendant allocution

 B. The modern practice of defendant allocution

 C. The correction of defendant allocution denials

 1. *The Rule 52 question of prejudice*

 2. *Rule 52 plain error*

VI. EQUAL RIGHTS FOR EQUAL RITES?

VII. CONCLUSION

**EQUAL RIGHTS FOR EQUAL RITES?:
VICTIM ALLOCATION, DEFENDANT ALLOCATION,
AND THE CRIME VICTIMS' RIGHTS ACT**

“[T]he defendant, personally, [should] have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.”³

“[E]very victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to the court to seek justice. When the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant’s crime be allowed to speak.”⁴

I. INTRODUCTION

Most of us feel honored and dignified when we are asked for our opinion on a matter or are asked to “tell our story.” Even for those of us who may be a bit shy about speaking publicly, knowing that others care enough to ask “and what do you have to say?” is ennobling. The same is all the more true when a person has the opportunity to stand before a court of law and present his or her views. Being afforded the right to participate in the solemn rite of a trial instills within the speaker a sense of value and dignity. The individual has been called to participate in one of the weightiest of our community rituals because that person’s presence and perceptions are deemed an important part of the legal process. The speaker’s views may not prevail, but the individual’s insights, experiences, and contributions are nonetheless acknowledged and validated by the mere fact that they were heard in an official legal forum.

An individual’s right to address a court also directly contributes to the legitimacy of our criminal justice process. We claim our criminal system is fair because it is open, public, and

³ United States v. Green, 365 U.S. 301, 304 (1961).

⁴ PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 77 (1982), available at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcprpt/welcome.html> (last visited August 25, 2007) (hereafter TASK FORCE).

seeks to ensure that all relevant voices are heard prior to the judicial pronouncement of innocence, guilt, or punishment.⁵ Being heard in a court of law, therefore, is intrinsically linked to notions of due process. Hence, if the right to address the court is fundamental, then there is an argument that the right which is granted to the defendant and government during the criminal proceedings should be expanded to apply to others directly vested in the trial process, specifically the victim. Indeed, such an argument has been made by victims' rights advocates.

Proponents of the victims' rights movement have claimed that over the course of our nation's history, the scales of justice lost their balance, tipping out of proportion in favor of defendants and to the detriment of victims. The fair treatment of defendants throughout the legal process was viewed as paramount, while victims became "faceless strangers"⁶ and were expected to "behave like good Victorian children – seen and not heard."⁷ The victim, as an individual with a substantial personal interest in the trial proceedings, second only perhaps to the defendant, was sidelined and excluded.

Victims' rights advocates have sought to change this status quo. Promoting more balanced participation between victims and defendants in the criminal justice system, advocates often quote Justice Cardozo's statement that "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."⁸ The argument of victims' rights advocates is that by giving

⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 US 555, 571-73 (1980).

⁶ *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (quoting *South Carolina v. Gathers*, 490 U.S. 805, 821 (1989)).

⁷ *Kenna v. U.S Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006) (Kenna I).

⁸ *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964). *See also* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's*

victims a more established place within the criminal justice system, not only will victims be better served, but the system itself will be more equitable.

Over the last thirty years, the victims' rights movement has made great strides in achieving this goal. The criminal justice system is far more accepting of the presence of victims in criminal proceedings and in responding to their needs and interests. One area where this is particularly evident is in victims' increased participation at sentencing. Congress' most recent piece of federal victims' rights legislation, the Crime Victims' Rights Act (CVRA),⁹ highlights

Right to Attend Trial: The Reascendant National Consensus, 9 LEWIS & CLARK L. REV. 481, 537-38 (2005); John Kyl, Steven J. Twist and Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 605-06 (2005) (hereafter Kyl, et al., *On the Wings of Their Angels*); John W. Stickels, *Victim Impact Evidence: The Victims' Right that Influences Criminal Trials*, 32 TEX. TECH. L. REV. 231, 242 (2001); Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369, 372-73, who reference Justice Cardozo's statement in the course of advocating for increased rights for victims. One must nonetheless note that Justice Cardozo's statement did not address the relationship between offenders and victims, but rather the relationship between the prosecution and the defense. 291 U.S. at 104-05 (holding that jury's view of crime scene where defendant was not also present did not violate the defendant's Fourteenth Amendment right to due process). *See also e.g.*, *Payne*, 501 U.S. at 827 (at sentencing, state should be able to present evidence regarding the victim and the harm suffered by the same to counter mitigating evidence presented by the defendant); *Miranda v. Arizona*, 384 U.S. 436, 519 n.16 (1966) (Harlan, J. dissenting) (challenging Court's decision to suppress a defendant's confession for alleged unfairness in police questioning); *Government of Virgin Islands v. Brown*, 507 F.2d 186, 190 (3rd Cir. 1975) (rejecting defendant's proposition that he has unilateral right to select trial date, irrespective of needs of state and court); *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1058 (6th Cir. 1983) (state evidence admissible under excited utterance exception to hearsay rule).

⁹ 18 U.S.C. § 3771 (2004). The Crime Victims' Rights Act (CVRA) was signed into law by President Bush on October 30, 2004. Under the Act,

the victim's expanded role at sentencing in that it grants to victims the express and enforceable right to be present and "reasonably heard."¹⁰ In discussing the scope of this right, courts and commentators have embraced advocates' call for equity, balance, and fairness between victims and defendants, and have referenced the defendant's analogous sentencing right of allocution as the model for the victims' right to be reasonably heard at sentencing.¹¹ For example, in *United States v. Degenhardt*, the court commented that

[T]he sentencing process cannot be reduced to a two-dimensional, prosecution verses defendant affair. Instead, the CVRA treats sentencing as involving a third dimension – fairness to victims – requiring that they be "reasonably heard" at sentencing. . . . The CVRA commands that victims should be treated equally with the defendant, defense counsel, and the prosecutor, rather than as a "faceless stranger."¹²

Similarly, in *Kenna v. U.S. Dist. Ct. for the Central Dist. of California (Kenna I)*, the court noted that in holding that victims have the right to speak at sentencing, "our interpretation [of the

the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

18 U.S.C. § 3771(e).

¹⁰ *Id.* at § 3771(a)(3), (4).

¹¹ As defined by Black's Law Dictionary, allocution is the

formality of a court's inquiry of defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction; or, whether he would like to make a statement on his own behalf and present any information in mitigation of sentence.

BLACK'S LAW DICTIONARY 49 (6th abridged edition 1991).

¹² 405 F. Supp. 2d. 1341, 1347 (D. Utah 2005).

CVRA] puts crime victims on the same footing [as defendants].”¹³ However, beyond merely invoking a comparison between the defendant’s right to allocute and the victim’s right to be reasonably heard at sentencing, there has been little analysis of whether the defendant’s right does indeed inform or serve as a model for the victim’s CVRA right. This article seeks to fill in that gap.

Despite the argument that victims’ rights should be predicated on equity and fairness, an examination of defendant and victim allocution makes clear that the two practices do not share much balance. However, the imbalance which exists between these two practices favors the victim. Unlike defendant allocution, which exists primarily as a means to make a calculable difference to the defendant’s sentence, the goals underpinning victim allocution are more expansive in their scope. While victim allocution does exist in part to provide the victim with an opportunity to provide the court with information to aid in the calculation of the defendant’s sentence, the practice also exists to enhance the dignity of the speaker, to provide a therapeutic and cathartic outlet, to educate other participants in the sentencing proceeding, and to increase the perceived equity and fairness of the legal system. These goals are far less prominent in the practice of defendant allocution where the defendant’s right is predicated almost entirely on the mitigating effect the practice can have on his sentence.¹⁴ The end result is that the nature of the

¹³ 435 F.3d 1011, 1016 (9th Cir. 2006). *See also e.g.*, Richard A. Bierschbach, *Allocution and the Purposes of Victim Participation Under the CVRA*, 19 FED. SENT. R. 44 (2006), 2006 WL 3522467; Amy Baron-Evans, *Traps for the Unwary Under the Crime Victims’ Rights Act: Lessons from the Kenna Cases*, 19 FED. SENT. R. 49 (October 2006), 2006 WL 3522468, *4 (2006).

¹⁴ For the sake of linguistic ease and efficiency, and unless discussion of a particular case requires otherwise, I will use male pronouns and adjectives to describe defendants as the majority of defendants are male. *See* UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF

right granted to victims is broader and more likely to be enforced than the right granted to defendants. Hence, to the extent that the victims' rights movement is predicated on arguments of fairness, equity, and balance, the scales appear to be tipped in favor of the victim.

This incongruity should give victims rights advocates a measure of pause. If advocates really do want to create more balance and equity in how victims and defendants are treated at sentencing, the disconnect between the two practices cannot be ignored. In light of the imbalance between victim and defendant allocution, perhaps victims' rights advocates should cede that they have been too successful in their efforts and call for a narrowing of the victim's right. However, I argue an alternative way to address the disparate treatment of defendant and victim allocution is to apply the theories underling victim allocution with equal force to defendant allocution. So doing, victims will be able to retain all which they have gained over the past thirty years. Similarly, defendants will benefit from participating in an allocution practice which provides them with more than solely the opportunity to impact their sentences. Finally, approaching the rite of allocution broadly for both victims and defendants instills within the criminal justice process the deeper notion that our criminal proceedings can indeed find a true balance.¹⁵

Part II of my article begins with brief history of the victims' rights movement and an examination of the role that the fairness and equality argument has played in advancing victims' rights. Part III outlines the basic structure of the CVRA, its enforcement mechanisms, and the sentencing rights it affords to victims. Part IV examines how courts have thus far addressed

JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 419 (2003) (noting that males constituted 85.3% of all convicted federal defendants in 2001), available at <http://www.albany.edu/sourcebook/index.html> (last visited August 28, 2007). When discussing victims, I will interchange my use of feminine and masculine pronouns.

¹⁵ *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

victim allocution under the CVRA, from which I identify two theories which advance the practice – a relevancy theory and a rite based theory. I conclude that while both theories influence the practice of victim allocution, it is the rite based theory which prevails in justifying the right’s existence. In Part V, I then turn to an examination of the history and practice of defendant allocution, topics which have received only scant review over the past sixty years. I reveal that in contrast to victim allocution, defendant allocution is justified primarily by the mitigating effect it can have on a defendant’s sentence. Hence, its practice and enforcement tends to be far more narrow than the victims’ right. Finally, in Part VI, I address this imbalance, and advocate for a re-conceptualization of defendant allocution which allows both victims and defendants to benefit from the transformative nature of the ritual of allocution practice.

II. THE VICTIMS’ RIGHTS MOVEMENT

The victims’ rights movement evolved out of the efforts of a variety of groups concerned with how victims were treated by the criminal justice system. The early work of these groups resulted in the state of California’s passage in 1965 of the first statute providing compensation to victims of crime,¹⁶ the creation of rape crisis and domestic violence centers,¹⁷ and the

¹⁶ See Frank Carrington & George Nicholson, *The Victim’s Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1, 2 n.3 (1984) (citing 1965 Cal. Stat. 3641, repealed by 1967 Cal. Stat. 3707, currently codified at CAL. GOVT. CODE §§ 13959-74 (West 1992 & 2006 Electronic update)).

¹⁷ See Sue Anna Moss Cellini, *The Proposed Victims’ Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT’L & COMP. L. 839, 853 (1997); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President’s Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 28-30 (1999).

establishment of the National Organization for Victim Assistance in 1975.¹⁸ However, it was with the 1982 release of the Final Report of the President's Task Force on Victims of Crime, that victims' rights became a firmly established topic of national debate. The Task Force, established in early 1982 by President Regan, was commissioned to "conduct a review of national, state and local policies and programs affecting victims of crime,"¹⁹ and "advise the President and Attorney General with respect to actions which can be undertaken to improve . . . efforts to assist and protect victims of crime."²⁰ The Report provided a disturbing account of how victims were treated by the criminal justice system and how such treatment was often perceived by victims to be far worse than that which they had suffered at the hands of the offender.²¹

¹⁸ See National Organization for Victim Assistance, *About NOVA*, <http://www.trynova.org/about/> (last visited July 29, 2007).

¹⁹ Exec. Order No. 12,360, 47 Fed. Reg. 17,975 (April 23, 1982).

²⁰ *Id.*

²¹ TASK FORCE, *supra* note 2 at 12-13. Advocates express concern that victims suffer a second phase of victimization in the course of reporting crimes and attempting to navigate their way through the criminal justice process. See e.g., *Senate Floor Statements in Support of the Crime Victims' Rights Act*, 105 Cong. Rec. S460-01, (April 22, 2004), reprinted at 19 FED. SENT. R. 62 (October 2006), 2006 WL 3522471, *5 (statement of Senator Kyl) (hereafter April 2004 Senate Floor Statement); DOUGLAS E. BELOOF, PAUL G. CASSELL, STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 20 (Carolina Academic Press 2d ed. 2006); Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 293-98 (1999) (hereafter Beloof, *The Third Model*); Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 No. 5 CRIM. L. BULLETIN 3 (2004); Kyl, et al., *On the Wings of Their Angels*, *supra* note 6 at 613; Ilyssa Wellikoff, *Victim Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO ONLINE J. CONF. RES. 2, at n.145 (2004). Affording victims more participatory rights in the criminal justice process is seen as one means by which to diminish secondary victimization.

The Task Force Report invoked broad and evocative themes of equity and fairness in calling for a shift in how the criminal justice system responds to victims. The Report claimed that when victims take the brave and socially responsible step to report the crimes committed against them

they find little protection. They discover instead that they will be treated as appendages of a system appallingly out of balance. They learn that somewhere along the way the system has lost track of the simple truth that it is supposed to be fair and protect those who obey the law while punishing those who break it. Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest.²²

Later, in expressing further concern regarding the treatment of victims, the Report claimed “[a] system which fails to be equitable cannot survive. The system was designed to be the fairest in history, but it has lost the balance that has been the cornerstone of its wisdom.”²³

The imbalance existing between victims and defendants in the criminal justice system is rooted within the public prosecution model which structures how crimes are addressed in our country.²⁴ For the majority of our nation’s history, crime has been viewed not simply as an injury against a private individual, but as a violation “which tears at the fabric of our peace and community and hence creates a harm that is greater than simply the harm to the victim

²² TASK FORCE, *supra* note 2 at vi.

²³ *Id.* at 16.

²⁴ *See generally* Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims’ Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 8-11 (1997); Beloof & Cassell, *supra* note 6 at 484-503; Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J. L. & PUB. POL’Y 357, 366-71 (1986); Cellini, *supra* note 15 at 844-49; William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 648, 651-55 (1976); and Tobolowsky, *supra* note 15 at 24-28 for a discussion of the transformation of the American criminal justice system from a private to public prosecution model.

involved.”²⁵ The public prosecution model emphasizes that certain wrongs are so violative of what is considered appropriate behavior in civil society that the power of the state should be brought against those who violate accepted social norms. By conceiving of crime as an act which not only harms the individual, but also all members of our corporeal body of ordered government, the state assumes the duties of prosecution and punishment thereby relieving the victim of the personal responsibility holding the perpetrator liable for his criminal acts.²⁶

However, an unfortunate by-product of the public prosecution model has been that victims were relegated to the role of witness or evidence, and consideration of their individual harms were treated as secondary to the state’s primary goal of deterring and punishing criminal activity.²⁷

Victims’ rights advocates have focused on this imperfection of the public prosecution model pointing out that “while criminal defendants have an array of rights under law,^[28] . . .

²⁵ Twist, *supra* note 6 at 369.

²⁶ Under the private prosecution model, which predominated in earlier manifestations of our criminal justice system, victims bore the responsibility of prosecuting the defendant, as well as financing his incarceration. *See* McDonald, *supra* note 22 at 651-54, describing the victim’s duties under the private prosecution model of criminal justice.

²⁷ Cardenas, *supra* note 22 at 371-72.

²⁸ During the 1960s, defendant rights were greatly expanded by the Supreme Court under the leadership of Chief Justice Earl Warren. *See e.g.*, Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518; Cellini, *supra* note 15 at 849; Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937, 942-48 (1985) (hereafter Henderson, *Wrongs*); Thad H. Westbrook, *At Least Treat Us Like Criminals!: South Carolina Responds to Victims’ Pleas for Equal Rights*, 49 S.C.L. REV. 575, 579-80 (1998). Key decisions from that era included *Mapp v. Ohio*, 367 U.S. 643 (1961) (establishing the exclusionary rule); *Gideon v. Wainwright*, 372 U.S. 335 (1964) (mandating that indigent defendants should be afforded government funded counsel); and *Miranda v. Arizona*, 384 U.S. 436 (1966) (commanding that the police inform individuals under arrest of their rights prior to interrogation).

victims, and their families, [are] ignored, cast aside, . . . treated as non-participants in a critical event in their lives,”²⁹ and granted few rights or protections throughout the criminal justice process. Victims’ rights laws seek to alter this seeming imbalance and further an understanding that the “criminal justice system, can and should care about both the rights of the accused and the rights of victims.”³⁰ The argument is that a legal system which provides victims “with participatory rights is not only what the law requires but also the right course in providing justice for all. Once victims’ rights are accepted as the rule of law to be followed, our federal criminal justice system will, in fact, be more just.”³¹

An equal rights argument, however, has not escaped criticism. First, one must acknowledge that victims and defendants are not and cannot be treated as absolute equals in the criminal justice process. Unlike the defendant, victims are not faced with the potential of having their liberty, property, or life taken from them by the government. Hence, the defendant’s interest in being present and being heard throughout the criminal process bears a vitality that cannot be matched by the victim. A concern has also been expressed that a call for equality between victims and defendants is really a screen from behind which those disdainful of broad constitutional rights for defendants can seek to undermine those rights.³²

²⁹ April 2004 Senate Floor Statement, *supra* note 19 at *3 (statement of Senator Feinstien).

³⁰ *Id.*

³¹ Russell P. Butler, *What Practitioners and Judges Need to Know Regarding Crime Victims’ Participatory Rights in Federal Sentencing Proceedings*, 19 FED. SENT. R. 21 (October 2006), 2006 WL 3522465, *2. *See also e.g.*, Twist, *supra* note 6 at 372 (“A justice system that affords its only rights to accused and convicted offenders, but preserves and protects none for its crime victims, has lost its essential balance. Moreover, such a system continues to lose the public’s confidence and its claim to respect.”).

³² Henderson, *Wrongs supra* note 26 at 951; Michael M. O’Hear, *Punishment, Democracy, and Victims*, 19 FED. SENT. R. 1 (October 2006), 2006 WL 3522462, *2, at notes 14-19 and

An equality or fairness argument is also tenuous because it is often predicated on the not entirely realistic dichotomy of the “good victim” and the “bad defendant.”³³ In making the argument for increased victims’ rights, the Task Force Report capitalized on the image of the blameless victim and nefarious defendant. In comparing victims and defendants, the Report commented that “the defendant’s every right has been protected, and now he serves his time in a public facility, receiving education at public expense. In a few months his sentence will have run. Victims receive sentences too; their sentences may be life long.”³⁴ The Report also suggested that for those victims who follow the perpetrator’s progress through the court system:

you reflect on how you and your victimizer were treated by the system that is called justice. You are aware of inequities that are more than procedural. During trial and after sentencing the defendant had a free lawyer; he was fed and housed; given physical and psychiatric treatment, job training, education, support for his family, counsel on appeal. Although you do not oppose any of these safeguards, you realize that you have helped to pay for all these benefits for the criminal. Now, in addition and by yourself, you must try to repair all that his crime has destroyed; and what you cannot repair, you must endure.³⁵

Such language is highly evocative and can justly lead one to feel great sympathy for crime victims. However, the image of the good victim and bad defendant is not as tidy as the Task Force Report implies. The mob member who gets shot during a drug dispute, or the batterer who drives his partner to retaliatory violence are crime victims, just as is the old man who is mugged

accompanying text (hereafter O’Hear, *Punishment*); Erin Ann O’Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL’Y 229, 242-43 (2005).

³³ Lynne Henderson, *Revisiting Victim’s Rights*, 1999 UTAH L. REV. 383, 413 (1999) (hereafter Henderson, *Revisiting*); Michael M. O’Hear, *Victims and Criminal Justice: What’s Next?*, 19 FED. SENT. R. 83 (October 2006), 2006 WL 3912216, *6 (hereafter O’Hear, *Victims and Criminal Justice*).

³⁴ TASK FORCE, *supra* note 2 at 11.

³⁵ *Id.* at 13.

or the teenager who is raped.³⁶ Nonetheless, by emphasizing the good victim/bad defendant image, a call for victims' rights can be easily transformed into a zero-sum game in which it is easy to conceive of granting greater rights to the more morally deserving of the two parties.³⁷

An equal participation or fairness model justifying victims' rights may also be insufficient to address some of the legitimate concerns victims have regarding their treatment by the criminal justice system as well as their victimization in general.³⁸ Certainly, victims often do desire to have notice of, observe, and participate in the prosecution of the crime committed against them to the same extent as is granted to the defendant. However, victims may have any number of other interests which are not as easily matched or balanced against the rights granted to defendants. These include "financial reparations, apology, victim-offender dialogue, protection of identity and personal privacy, psychological counseling, and protective or rehabilitative measures to prevent re-victimization."³⁹ Hence, an equal rights justification for victims' rights is not and cannot be all encompassing.

Regardless of these legitimate criticisms, the argument for equal and fair treatment for victims has been highly effective in establishing an expanded role for victims in the criminal justice system, and remains a prevalent theme in justifying victims' rights. Since the Task Force Report was issued in 1982, almost every state has passed some form of victims' rights legislation,⁴⁰ and over thirty states have passed amendments to their state constitutions granting

³⁶ See e.g., Henderson, *Revisiting supra* note 31 at 404; Henderson, *Wrongs supra* note 26 at 951.

³⁷ See O'Hear, *Punishment, supra* note 30 at *; O'Hear, *Victims and Criminal Justice, supra* note 31 at *6.

³⁸ O'Hear, *Victims and Criminal Justice, supra* note 31 at *6.

³⁹ *Id.*

⁴⁰ State statutes have included providing victims with the right to be informed of the status of their case, see e.g., ALASKA STAT. § 12.61.015(a)(2) (Michie 2000); CAL. PENAL CODE § 679.03

rights to victims.⁴¹ Similarly, on the federal level, Congress has passed numerous pieces of victims' rights legislation, the most recent of which is the CVRA.⁴² These varying statutes and state amendments make clear that victims are no longer silent Victorian children within the

(West 1999); IND. CODE § 35-40-5-2; LA. REV. STAT. ANN. § 1844.A (West 1999 & Supp. 2001); S.C. CODE ANN. § 16-3-1530 (Law Co-op. Supp. 1999); TEX. CRIM. PROC. CODE ANN. § 56.08 (Vernon Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 56.11 (Vernon Supp. 2001); TEX. CRIM. PROC. CODE ANN. § 56.12 (Vernon Supp. 2001); UTAH CODE ANN. § 64-13-14.7(2)-(4) (1999); UTAH CODE ANN. § 77-38-3 (1999); and the right to be heard at any proceeding involving sentencing or post-conviction release decisions. *See e.g.*, ALA. CODE § 15-23-74 (1995); FLA. STAT. ch. 960.001(1)(a)5 (2000); MISS. CODE ANN. § 99-36-5(1)(e) (1999); TEX. CRIM. PROC. CODE ANN. § 56.02(a)(5) (Vernon Supp. 2001); WASH. REV. CODE § 7.69.030(13) (2001).

⁴¹ *See e.g.*, ALA. CONST. amend. 557; ARIZ. CONST. art. 2, § 2.1; COLO. CONST. art 2, § 16a; FLA. CONST. art. 1, § 16(b); ILL. CONST. art. I, § 8.1; LA. CONST. art. I, § 25; MICH. CONST. art 1, § 24; MO. CONST. art. 1, § 32; NEV. CONST. art. 1, § 8; N.M. CONST. art II, § 24; OHIO CONST. art. I, § 10a; OREG. CONST. art. 1, § 42; TEX. CONST. art. 1, § 30; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35. Many of the state amendments grant victims the right to be treated with fairness and promise that their rights to justice and due process will be protected. *See e.g.*, ARIZ. CONST. art. 2, § 2.1(a); CONN. CONST. art. XXIX, § 1; IDAHO CONST. art. 1, § 22(1); N.J. CONST. art. I, p. 22; OHIO CONST. art. I, § 10(a); TENN. CONST. art. I, § 35. It must be noted however, that a number of the state victims' rights amendments temper the rights granted to victims by highlighting that a victim's rights cannot exceed a defendant's constitutionally protected rights or serve as a means to set aside, reverse, or vacate the result of a criminal proceeding. *See e.g.*, CONN. CONST. art. XXIX, § 10; FLA. CONST. art I, § 16(b); IDAHO CONST. Art. I, § 22; OHIO CONST. art. I, § 10(a); WISC. CONST. art. I, § 9m.

⁴² 18 U.S.C. § 3771. Previously passed federal victims' rights legislation includes the Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510 (1997), the Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10606 (1990), the Victims of Crime Act of 1984, 42 U.S.C. § 10601, and the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982).

criminal justice system.⁴³ Instead, they possess an independent role, distinct from the government, in the administration of criminal justice. The sentencing rights granted to victims under the CVRA provides one window through which to address whether that independent role can be appropriately balanced against the rights granted to defendants.

III. THE CRIME VICTIMS RIGHTS ACT (CVRA)

The CVRA provides victims of federal crimes with a number of rights. These include the right to receive notice of any public court or parole proceeding involving the crime, along with notice of the release or escape of the accused.⁴⁴ Victims also have the right to be present and reasonably heard at any public court or parole proceeding.⁴⁵ As is particularly relevant to this paper, the right to be reasonably heard applies to sentencing hearings.⁴⁶

⁴³ Kenna I, 435 F.3d 1011, 1013 (9th Cir. 2006).

⁴⁴ 18 U.S.C. § 3771(a)(2).

⁴⁵ *Id.* at § 3771(a)(3), (4). A victim can only be excluded from these proceedings if a court decides, based on clear and convincing evidence, that any testimony the victim might provide would be materially altered by other information the victim might hear at the proceeding. *Id.* at § 3771(a)(3).

⁴⁶ *Id.* at § 3771(a)(4). The 1982 President's Task Force Report on Victims of Violent Crime significantly advanced the argument for victim allocution at sentencing, recommending in part that victims be permitted to present impact statements. TASK FORCE, *supra* note 2 at 18, 33. *See also, supra* note 38 listing state statutes granting victims the right to be heard at sentencing and post conviction release proceedings. The Supreme Court's decision in *Payne v. Tennessee* further legitimized the presence of victims at sentencing and their presentation of impact evidence, albeit as witnesses for the state. 501 U.S. 808 (1991). *See also infra* notes 60-63, 70 and accompanying text regarding the role of victim statements at sentencing in capital trials.

Victims also have the right to be reasonably protected from the accused, *id.* § 3771(a)(1), the reasonable right to confer with the government attorney in the case, *id.* at § 3771(a)(5), the right to full and timely restitution under the law, *id.* at § 3771(a)(6), and the right to “proceedings free from unreasonable delay.” *Id.* at § 3771(a)(7). Finally, the CVRA grants victims “the right

The CVRA further vests victims with standing to challenge violations of their rights by through the writ of mandamus.⁴⁷ Normally, the writ is viewed as an extraordinary remedy granted only under very specific circumstances.⁴⁸ However, by directing that courts “shall take up and decide” any motion filed by a victim, the CVRA tempers the discretionary nature of mandamus relief and makes a court’s consideration of a victim’s complaint mandatory.⁴⁹ Pursuant to the statute, a victim is to first assert her rights “in the district court in which the

to be treated with fairness and with respect for the victim’s dignity and privacy.” *Id.* at § 3771(a)(8).

⁴⁷ Prior to the passage of the CVRA, federal crime victims had difficulty in enforcing their statutorily granted rights. This problem was brought into sharp focus during the Oklahoma City bombing trials. During the proceedings, the trial court ruled that under the traditional evidentiary rule authorizing sequestration of witnesses, *see* FED. R. EVID. 615 (exclusion of witnesses), those victims who planned to present victim-impact testimony during the sentencing proceedings were prohibited from attending the trial itself. *United States v. McVeigh*, 106 F.3d 325, 328 (10th Cir. 1997). The victims appealed, claiming the court’s order violated their right to attend the trial under the Victims’ Rights and Restitution Act of 1990. *See* 42 U.S.C. § 10606(b)(4) (victims have right “to be present at all public court proceedings related to the offense”). In rejecting their claims, the Tenth Circuit Court of Appeals noted that at most, the Act “charily pledges only the ‘best efforts’ of certain executive branch personnel to secure the rights listed.” *McVeigh*, 106 F.3d at 335. Additionally, the court concluded that in no manner did the Act “create a cause of action or defense in favor of any person arising out of the failure to afford a victims the rights enumerated” in the Act. *Id.* At bottom, the victims lacked standing “to seek review of orders relating to matters covered by the Act.” *Id.*

⁴⁸ *See* *Kenna I*, 453 F.3d at 1017; Senate Floor Statement in Support of the Crime Victims’ Rights Act, 150 Cong. Rec. S10910-01 (October 9, 2004), 19 Fed. Sent. R. 69 (October 2006), 2006 WL 3522474, *6 (hereafter October 2004 Senate statement).

⁴⁹ *See* 18 U.S.C. § 3771(d)(3). *See also* *Kenna I*, 435 F.3d at 1017; *In re Huff Asset Management Co.*, 409 F.3d 555, 563 (2d Cir. 2005); *Kyl, et. al., On the Wings of Their Angels*, *supra* note 6 at 618; October 2004 Senate Floor Statement, *supra* note 46 at *6.

defendant is being prosecuted for the crime, or if there is no prosecution underway, in the district court in the district where the crime occurred.”⁵⁰ The district court is required to address the victim’s claim, and if the claim is denied, the victim is to petition the court of appeals.⁵¹ The CVRA provides a streamlined procedure by which a single judge on the respective court of appeals can review the victim’s petition for the writ of mandamus, and directs that the court must issue a decision within seventy-two hours after the petition was filed.⁵² If the court denies the victim’s request for relief, the court is required to issue a written opinion clearly stating its reasons for doing so.⁵³

The CVRA nonetheless places some limits on a victim’s request for relief. First, the violation of a victim’s rights under the statute in no way creates grounds for a victim to seek a new trial of the defendant.⁵⁴ Similarly, should a victim be denied her right to be heard at sentencing or any other appropriate proceeding, the CVRA directs that the victim is permitted to file a motion seeking the re-opening of a plea or sentence only where she

asserted the right to be heard before or during the proceeding at issue and such right was denied; the victim petition[ed] the court of appeals for a writ of mandamus within 10 days; and in the case of a plea, the accused [did] not [plea] to the highest offense charged.⁵⁵

The statute also directs that “[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for the purposes of enforcing this chapter.”⁵⁶ Presumably, this time limit, coupled with the seventy-two hour constraint placed on the courts of appeal, serve to guard

⁵⁰ 18 U.S.C. § 3771(d)(3).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at § 3771(d)(5).

⁵⁵ *Id.*

⁵⁶ *Id.* at § 3771(d)(3).

against placing the defendant in a state of limbo in terms of entering a plea, arguing for pre-trial release, or proceeding to sentencing.

IV. VICTIM ALLOCUTION UNDER THE CVRA

A. The goals of victim allocution

Since passage of the CVRA in 2004, the scope of victim sentencing rights under the statute has already been subject to examination by the courts. *Kenna I*,⁵⁷ *Degenhardt*,⁵⁸ and *United States v. Marcello*,⁵⁹ provide a snapshot of where victim sentencing participation currently stands under the statute. This small but growing body of case law highlights that victim allocution exists to serve a variety of purposes. These include

(1) to permit the victim to regain a sense of dignity and respect rather than feeling powerless and ashamed; (2) to require defendants to confront – in person and not just on paper – the human consequences of their illegal conduct; and (3) to compel courts to fully account in the sentencing process for the serious societal harms

of crime.⁶⁰ Pared down to their essentials, one could describe these three goals as (1) empowering the victim, (2) educating the defendant, and (3) informing the court.

These three goals are further supported by two distinct theories. One theory centers on the relevancy or impact that victim allocution statements have on the calculation of the defendant's sentence. The other theory focuses far more on the ritualistic power of standing before a court and expressing one's views. This latter rite based theory for victim allocution

⁵⁷ *Kenna I*, 453 F.3d 1011 (9th Cir. 2006); *see also In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) (*Kenna II*).

⁵⁸ *United States v. Degenhardt*, 405 F. Supp. 2d 1341 (D. Utah 2005).

⁵⁹ *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005).

⁶⁰ Janye W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 41 (2001). *See also* 435 F.3d at 1016 (citing Barnard, *Allocution*); 405 F. Supp. 2d at 1038 (same); Bierschbach, *supra* note 11 at *3-5; Erez, *supra* note 19 at note 7 and accompanying text.

addresses the relationship created between the victim and defendant as a result of the defendant's criminal acts. By affording to the victim the ritual of speaking in court, the victim is provided the opportunity to alter that relationship through personal empowerment and the education of the defendant. While both the relevancy and rite based theories for victim allocution are evident in the current application of the CVRA, I argue the rite based approach prevails.

B. A relevancy theory for victim allocution

When one reviews the purposes for victim allocution, the last articulated purpose – providing information to the court – nicely furthers a relevancy theory for victim allocution. The theory proffers that a core justification for victim allocution centers on the victim's contribution to the sentencing outcome. In essence, victims should be granted the right to allocute because what they have to say is relevant to the court's determination. Senator Kyl, a sponsor of the CVRA, highlighted this relevancy theme when he stated that the content of victim allocution should include “all three types of victim impact: the character of the victim, the impact of the crime upon the victim, the victims' family and the community, and sentencing recommendations.”⁶¹ These three categories of victim sentencing information are traditionally invoked as the acceptable content for victim impact statements (VIS), a closely aligned, but I believe distinguishable practice, from the broader sentencing rights granted victims under the CVRA.

⁶¹ October 2004 Senate Floor Statement, *supra* note 46 at *2 (statement of Senator Kyl); *see also* April 2004 Senate Floor Statement, *supra* note 19 at *5 (statement of Senator Feinstein indicating victims should be able to provide “any information, as well as their opinion . . . concerning the . . . sentencing of the accused.”).

VIS is discussed most often in the context of capital sentencing.⁶² It is not my goal here to engage in an analysis of victim allocation or VIS, as they may apply to death penalty cases. As is oft cited, “death is different,”⁶³ and raises a host of sentencing issues not present in a non-capital case, none of which are the focus of this article. Nonetheless, a brief discussion of VIS,

⁶² In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court tussled with the constitutionality of VIS in capital trials and held that a state’s use of VIS at sentencing did not *per se* violate a defendant’s rights under the Eighth Amendment. *Id.* at 827. As the post-*Payne* case law has evolved, three major categories of victim impact are regularly received from victims. *See e.g.*, *United States v. Sampson*, 332 F. Supp. 2d 325, 338 (D. Mass. 2004) (VIS has become a “regular, legitimate feature” of federal capital trials). These include statements regarding the nature of the victim, statements regarding the emotional impact of the crime, and statements regarding the victim’s opinion of the nature of the defendant’s actions, as well as the victim’s opinion as to an appropriate sentence for the defendant. The first two categories were explicitly approved by the Court in *Payne*. 501 U.S. at 817. The constitutionality of the latter category, especially in terms of a victim’s recommendation of a sentence in a capital case, remains an open question. *See id.* at 830 n.2 (noting that VIS regarding victim’s opinions regarding the crime or a sentence for the defendant may still be barred); John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 272-73 (2003); Kyl et al, *On the Wings of Their Angels*, *supra* note 6 at 604-08; Wayne A. Logan, *Victim Impact Evidence in Federal Capital Trials*, 19 FED. SENT. R. 5 (2006), 2006 WL 3522463, *7-8.; Niru Shanker, *Getting a Grip on Payne and Restricting the Influence of Victim Impact Statements in Capital Sentencing: The Timothy McVeigh Case and Various State Approaches Compared*, 26 HASTINGS CONST. L. Q. 711, 738-39 (1999). In the context of non-capital cases, it is generally accepted that all three types of VIS are acceptable. *See e.g.*, *Booth v. Maryland*, 482 U.S. 496, 507 n.10, 509 n.12 (1987), *overruled in part by Payne*, 501 U.S. 808; *George v. Angelone*, 100 F.3d 353, 359-60 (4th Cir. 1996); *United States v. Santana*, 908 F.2d 506, 507 (9th Cir. 1990); Kyl et al, *On the Wings of Their Angels*, *supra* note 6 at 608.

⁶³ *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

especially in light of its reference by the authors of the CVRA, is important in examining the scope of victim allocution under the statute and the theories which underlie its practice.

With VIS, the victim traditionally testifies as a witness, generally for the state. What the victim can say is limited by evidentiary rules, and in capital cases, is subject to constitutional challenge.⁶⁴ Conversely, when a victim exercises her right to be reasonably heard under the CVRA, she is not acting as a witness. The victim's act of speaking is an individual choice, separate from any decision of the state or defense. The victim has far more latitude to express opinions independent of and contrary to those presented by the government, which might include seeking forgiveness or mercy for the defendant.⁶⁵

Framers and advocates of the CVRA note that the statute makes victims "independent participants" in the criminal process.⁶⁶ In attempting to provide some meaning to the phrase

⁶⁴ See e.g., Payne, 501 U.S. at 922 (VIS regarding the character of the victim and harm suffered by victims appropriate); *id.* at 831 (O'Connor, J., concurring) (VIS should be excluded where it is unduly inflammatory). One must nonetheless acknowledge that it does not appear that defendant's death sentence has ever been overturned as the result of an inflammatory or inappropriate victim impact statement. Logan, *supra* note 60 at *3 & n.39.

⁶⁵ Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology Into Criminal Procedure*, 114 YALE L.J. 85, 137 (2004); Bierschbach, *supra* note 11 at *6; Erez, *supra* note 19 at notes 80-81 and accompanying text; Andrew J. Karmen, *Who's Against Victims' Right? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 157, 162 (1992); Tobolowsky, *supra* note 15 at 84-85.

⁶⁶ *Kenna I*, 435 F. 3d 1011, 1013 (9th Cir. 2006); October 2004 Senate statement, *supra* note 46 at *2; Douglas E. Beloof, *Judicial Leadership at Sentencing Under the Crime Victims' Rights Act: Judge Kozinski in Kenna and Judge Cassell in Degenhardt*, 19 FED. SENT. R. 36 (October 2006), 2005 WL 3522466, *7 (hereafter Beloof, *Judicial Leadership*); Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. REV. 835, 852 (2005).

“independent participant,” Professor Douglas Beloof, a leading scholar and advocate for victims’ rights, has suggested the phrase should be defined as a “crime victim with rights of intermittent participation in the criminal process.”⁶⁷ These intermittent rights however, have not transformed victims into parties or even quasi-litigants. In *In re Kenna (Kenna II)*,⁶⁸ the court rejected the victim’s argument that his right to be reasonably heard under the CVRA included the right to litigate, as a party, the calculation of the defendant’s sentence.⁶⁹ Nor does the CVRA put a victim in a position ahead of the defendant and state, by permitting the victim to “present evidence for the first time at the sentencing hearing under the guise of unsworn allocution”⁷⁰ However one may define the victim’s participatory rights, the victim’s status as an independent participant provides him with the autonomy to decide whether or not to speak at sentencing.⁷¹ Despite the broader scope of sentencing rights granted to victims under the CVRA than those provided to victims with VIS, by aligning victim allocution under the CVRA with the scope of VIS, there is a strong implication that the victim’s statement should be relevant to the court’s sentencing determination. The three categories of victim impact evidence cited by the CVRA’s authors tend to be viewed as a means by which to inform “the sentencing authority

⁶⁷ See e.g., Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 286 (2003).

⁶⁸ 453 F.3d 1136 (9th Cir. 2006) (Kenna II).

⁶⁹ *Id.* at 1137. See also Matthew B. Riley, Note *Victim Participation in the Criminal Justice System: In re Kenna and Victim Access to Presentence Reports*, 2007 UTAH L. REV. 235, 250 (2007).

⁷⁰ Baron-Evans, *supra* note 11 at *5.

⁷¹ Kenna I, 435 F.3d 1011, 1013, 1016 (9th Cir. 2006); *United States v. Degenhardt*, 405 F. Supp. 2d at 1344; October 2004 Senate Floor Statement, *supra* note 46 at *2; Beloof, *Judicial Leadership* *supra* note 64 at *7.

about the specific harm caused by the crime in question,”⁷² and serve to aid the court in reaching a sentencing outcome.

Cases interpreting victims’ CVRA sentencing rights highlight this relevancy theme. For example, in *Marcello*, the court addressed a victim’s analogous right under the CVRA to be reasonably heard at the pre-trial release/detention hearing of two defendants.⁷³ The *Marcello* court indicated that it was not obligated to hear from the victim where what the victim had to say was not material to the court’s decision.⁷⁴ The *Marcello* court had to decide whether, at a pre-trial detention hearing for two defendants charged with murder, it was obliged to grant the victim’s son the right to speak at the hearing.⁷⁵ The court stated that in making its release decision, it was required to consider the strength of the case against the defendants, the seriousness of the crime for which the defendants were charged, and “the reasonable

⁷² 501 U.S. at 825.

⁷³ 370 F. Supp. 745, 746 (N.D. Ill. 2005). While addressing an issue distinct from the victim’s right to be heard at sentencing, the *Marcello* court’s analysis is nonetheless relevant in that it examined the portion of the CVRA which grants victims the right to be heard at pre-trial release hearings and at sentencing proceedings. See 18 U.S.C. § 3771(d)(4) (victims have the “right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding”).

⁷⁴ 370 F. Supp. 2d at 746.

⁷⁵ *Id.* at 747. As referenced earlier, the CVRA guides that

the term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim’s estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim’s rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

18 U.S.C. § 3771(e).

apprehension of personal danger to the victim.”⁷⁶ There was no question that the crimes for which the defendants were charged were serious, and there was no claim by the son that he would be at risk if the defendants were released. Hence, the only potential information the son could provide the court related to the strength of the case against the defendants. The court determined the son was in no position to provide an opinion on this matter, especially since the alleged murder had occurred twenty years earlier.⁷⁷ The court therefore concluded that it was not required to hear from the son as what the son had to say had no bearing on the decision before it.⁷⁸

In the course of reaching its conclusion however, the court indicated its decision should not be interpreted to wholly preclude a victim’s right to be heard at sentencing. Indeed, the court strongly suggested that in the context of sentencing

the policy of hearing the victim is wise. . . . [I]n a moral sense, [the victim is] a party to the case and . . . should always be given the opportunity to testify at all sentencing hearings and some bond hearings [due to the] likelihood that the victim’s statements would be material and relevant to the issue before the court.⁷⁹

The court further opined that victim “statements will (at least in sentence and prison release hearings) *almost always be relevant*, material and spoken from [the victim’s] personal knowledge.”⁸⁰ However, the court was unwilling to categorically rule that section 3771(d)(4) of the CVRA requires that victims be permitted to be heard by the court in all instances. Instead, the court limited the victim’s right to speak by focusing on the materiality and relevancy of what

⁷⁶ 370 F. Supp. 2d at 746.

⁷⁷ *Id.* & n5.

⁷⁸ *Id.* at 748.

⁷⁹ *Id.* at 746 n.2. The court was correct to qualify its statement that the victim is a party to the case. While one might intuitively appreciate the abiding and personal interests victims may have in a criminal proceeding, victims are not parties to the action.

⁸⁰ 370 F. Supp. 2d at 750 (emphasis added).

the victim had to offer. Hence, according to the *Marcello* court, a victim's contribution to the sentencing process should have the capacity of making some difference to the outcome of the proceeding.⁸¹

In *Kenna I*, the relevancy of a victim's allocution statement was also referenced. There, father and son defendants "swindled scores of victims out of almost \$100 million."⁸² At the father's sentencing hearing, several victims presented written impact statements, and the petitioner, Mr. Kenna, spoke to the court regarding the effect the defendants' crimes had on him. Three months later the son was sentenced, and Mr. Kenna again sought to exercise his CVRA rights at sentencing. The court denied his request, stating

I listened to the victims the last time . . . and, quite frankly, I don't think there's anything that any victim could say that would have any impact whatsoever. I - what can you say when people have lost their life savings and what can you say when the individual who testified last time put his client's [sic] into this investment and millions and millions of dollars and ended up losing his business? There just isn't anything else that could possibly be said.⁸³

The trial court seemed to indicate that there was no need to hear Mr. Kenna because nothing he could say would make a difference to judge's sentence determination. Many of the victims had already spoken or addressed the court in written form at the father's sentencing hearing, and according to the trial court, this was sufficient.

⁸¹ *Id.* The CVRA also directs that where a victim is denied the right to be reasonably heard at a plea hearing, the victim cannot seek to re-open that proceeding if the defendant entered a plea to the highest crime charged. 18 U.S.C. § 3771(d)(5)(C). The implication and assumption here is that the victim would wish to speak against the defendant entering a plea to a lower offense, but would have nothing relevant to offer or contribute to the proceeding if the defendant entered a plea to the highest offense charged.

⁸² *Kenna I*, 435 F.3d 1011, 1012 (9th Cir. 2006).

⁸³ *Id.* at 1013.

The trial court's ruling was rejected on appeal. The appellate court emphasized that it was important for a sentencing court to hear from a victim because the victim could assist the court in determining the defendant's sentence by sharing information as to how the defendant's actions harmed the victim.⁸⁴ In particular, any number of secondary or tertiary harms could have developed between the father's sentencing hearing and son's hearing, and the victim had a right to share those harms with the sentencing court.⁸⁵ The appellate court underscored that in order for the district court to properly render a sentence for the defendant, it had to "consider the effects of the crime on the victims at the time it makes its decision with respect to punishment, not as they were at some point in the past."⁸⁶ The court therefore remanded the case to the trial court for further proceedings.

C. A rite based theory for victim allocution

A relevancy theory alone, however, cannot account for the other proffered purposes of victim allocution under the CVRA. Providing the victim with the right to be reasonably heard at sentencing so as to empower the victim and morally educate the defendant have very little bearing on the calculation of the defendant's sentence. Instead, these additional goals reveal that the practice of hearing from the victim is important because it focuses on the relationship created between the victim and the defendant as the result of the defendant's criminal acts, and seeks – through the ritual of the victim speaking before the court – to change that relationship. In this regard, the broader goals for victim allocution can be described as being supported by a rite

⁸⁴ *Id.* at 1016.

⁸⁵ *Id.* at 1016-17.

⁸⁶ *Id.* at 1017.

based theory which focuses on the transformative value that the ritual of sentencing allocution provides to the victim.⁸⁷

A growing body of scholarship exists addressing the connection between informal social norms, such as rituals, and the influence such practices have on our formal legal constructs.⁸⁸ The connection between ritual and the law is nowhere more evident than in how a so much of our law's structure and content is expressed through the ritual of a trial. Legal proceedings begin with the call of "all rise," and are finalized with the pounding of the judge's gavel. Between those two distinct moments, the trial participants engage in a series of formalized procedures which include the swearing in of the jury, witnesses taking the stand, the pronouncement of a verdict, and the determination of a sentence.

The regularity and repetition of ritual "sets [it] apart from the ordinary course of life, lifts it from the realm of everyday practical affairs, and surrounds it with an aura of enlarged importance." It creates a time and space which is, if not quite sacred, at the very least emotionally charged.⁸⁹

The trial's participants, whether as acting as judge, defendant, victim, or jury, serve as conduits for expressing the ritual's underlying goal and purpose – the determination of guilt and

⁸⁷ Bierschbach, *supra* note 11 at *5 ("The moment of sentencing is among the most public, formalized, and ritualistic parts of a criminal case.").

⁸⁸ Andrew J. Cappel, *Bringing Cultural Practice Into Law: Ritual and Social Norms Jurisprudence*, 43 SANTA CLARA L. REV. 389, n.1-2 (2003) (listing scholarship); Geoffrey Miller, *The Legal Function of Ritual*, 80 CHI.-KENT L. REV. 1181, 1182-83 & n.2-3 (same) (2005). See also Mark Cammack, *Evidence Rules and the Ritual Functions of Trials: "Saying Something of Something,"* 25 LOY. L.A. L. REV. 783 (1992).

⁸⁹ Cammack, *supra* note 86 at 789 (quoting CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 448 (1973)).

administration of justice.⁹⁰ These individuals “feel a certain sense of responsibility for the ritual’s success – feelings that can facilitate identification with the ritual and acceptance of the social roles that the ritual process assigns to the participants and others.”⁹¹ Such participation also has the capacity to transform those engaged in the ritual. Even if some of the participants are unwillingly present at the trial, as is most likely for the defendant, and perhaps even the victim, they nonetheless come together “with a transcendent sense of reality and meaning, [and the ritual encourages] people to be open to changes in their sense of self.”⁹²

The transformative nature of the ritual of trial is particularly important when one examines crime from a relational standpoint. Through the commission of crime, the defendant’s acts underscore that he has placed himself in a position superior to the individual he harmed, while equally imposing on the victim an inferior status.⁹³ The defendant’s acts objectify the victim by treating that person as a means to an end – the commission of the crime – while simultaneously indicating his belief that community norms do not apply to him.⁹⁴ While others may be bound to follow the law, the offender, by breaking from social norms, emphasizes that he

⁹⁰ Other examples of messages which can be sent through ritual include affirming the existence of relationships through a marriage ceremony, Miller, *supra* note 86 at 1208-1212; enhancing patriotism through recitation of the pledge of allegiance, Sheldon H. Nahmod, *The Pledge as Sacred Political Ritual*, 13 WM. & MARY BILL OF RTS. J. 797 (2005); or acknowledging a change of authority through an installation or inauguration. Miller, *supra* note 86 at 1212-14.

⁹¹ Miller, *supra* note 86 at 1189.

⁹² *Id.* at 1191.

⁹³ Barnard, *supra* note 58 at 75; Beloof & Cassel, *supra* note 6 at 536; Bibas & Bierschbach, *supra* note 63 at 109-12; Lynne N. Henderson, *Co-opting Compassion: The Federal Victim’s Rights Amendment*, 10 ST. THOMAS L. REV. 579, 594-95 (1998) (hereafter Henderson, *Co-Opting Compassion*).

⁹⁴ Bibas & Bierschbach, *supra* note 63 at 109-12.

rejects being a part of, and living in relation to, his community. Crime then, represents in part, a social and moral imbalance between the victim, defendant, and society. The legal system, and more specifically, the ritual of trial, seeks to redress this imbalance.⁹⁵

In granting the victim the opportunity to be heard prior to the pronouncement of the defendant's sentence, the individual is provided a forum which directly and individually acknowledges her victim-hood. "The moment of sentencing is among the most public, formalized, and ritualistic parts of a criminal case. By giving victims a clear and uninterrupted voice at this moment on par with that of defendants and prosecutors, a right to allocute signals both society's recognition of victims' suffering and their importance to the criminal process."⁹⁶ Hence, a victim's impact statement or act of allocution "is not merely a protocol or procedure, but rather a measure that fulfills a need for expression and [is an] important way to recognize [her] status as victim[]." ⁹⁷ Through the rite of allocution, the victim is also provided with opportunity for transformation, empowerment, and healing. The victim may enter the courtroom as an individual belittled or terrorized. However, by sharing with the court and defendant how the defendant's actions impacted her, the victim can begin to readjust the moral and social imbalance between herself and the defendant, and shift from being a victim to being a survivor.

⁹⁵ Bibas & Bierschbach, *supra* note 63 at 111-12; Henderson, *Co-opting Compassion supra* note 91 at 594-95.

⁹⁶ Bierschbach, *supra* note 11 at *5. *See also* Erez, *supra* note 19 at note 27 and accompanying text (citing to research which notes that two-thirds of victims participated at sentencing for therapeutic or expressive reasons).

⁹⁷ Erez, *supra* note 19 at note n.50 and accompanying text; *id.* at notes 87-88 and accompanying text. Professor Erez's research also indicates that victims value the opportunity to participate at sentencing because their status as a victim is recognized in the official forum of the courts.

The ritual of victim allocution also serves to educate the defendant. By forcing the defendant to hear directly from the victim highlights for him that his actions did not occur in isolation, and have legal as well as moral and emotional ramifications.⁹⁸

The victim is ideally placed to sensitize the offender to the consequences of the crime. . . . Because both victims and offenders are neither part of the legal profession nor familiar with its legal jargon, a direct appeal by the victim to the offender may be a more effective route to bring offenders to accepting responsibility.⁹⁹

In the best of circumstances, the defendant may feel genuine remorse for his actions, apologize for the same, and set himself upon a new path of redeemed living. However, even if the defendant remains unrepentant, hearing from the victim could implant within him seeds of remorse which later may sprout into reformation. Hence, for the victim, as well as perhaps the defendant, the right of victim allocution creates an environment where both may be transformed by the victim's speech. The victim is able to right to imbalance between herself and the defendant, while the defendant likewise has the opportunity to reframe himself in light of learning directly from the victim of how his choices impacted her.

A rite based theory for victim allocution is embraced by courts interpreting the CVRA. Courts emphasize, sometimes in the very same decisions which invoke the relevancy theme, that providing victims with the rite of allocution is important regardless of whether what the victim has to say is relevant to the court's sentencing decision. For example, in *Degenhardt*, the court indicated that

even if a victim has nothing to say that would directly alter the court's sentence, a chance to speak still serves important purposes. As the First Circuit has pithily explained, "allocution is both a rite and a right." Part of the rite is a chance for the participants - the defendant, the prosecution, and now the victim - to have

⁹⁸ See Erez, *supra* note 19 at notes 75-76 and accompanying text.

⁹⁹ *Id.*

their say before sentence is imposed. That process is short-circuited if one of the participants - the victim - is denied an opportunity to speak.¹⁰⁰

Similarly, in *Kenna I*, the court stated that victim allocution is important because the victim should have the opportunity to “confront [the] defendant who has wronged them . . . [and] look [the] defendant in the eye and let him know the suffering his misconduct has caused.”¹⁰¹ In this regard then, what a victim has to say may not matter legally, but the practice is nonetheless important because of the dignitary, cathartic, and moral education goals it furthers.

How courts have specifically interpreted the CVRA’s language grant victims the “right to be reasonably heard at . . . sentencing”¹⁰² further advances a ritualistic grounding for victim allocution. The statute’s language has caused some to question whether the victim has the right to speak to the court, or whether the victim’s views can be limited to some other format, such as being presented in a written manner. In *Kenna I* and *Degenhardt*, the courts concluded that the CVRA provided victims with the right to speak,¹⁰³ while the court in *Marcello* implied that the victim’s right to be heard should be predicated on the relevancy of the victim’s proffered statement.¹⁰⁴

In reaching these divergent results, all three courts began by acknowledging that the CVRA’s language is ambiguous, in that the phrase “reasonably heard” can be interpreted in a

¹⁰⁰ United States v. Degenhardt, 405 F. Supp. 2d 1341, 1349 (D. Utah 2005) (quoting United States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994)). Professor Douglas E. Beloof, a leading scholar and advocate for victims’ rights, agrees that the under the CVRA, “whether or not the victim has relevant facts to present does not matter.” Beloof, *Judicial Leadership*, *supra* note 64 at *7.

¹⁰¹ *Kenna I*, 435 F.3d 1011, 1016-17 (9th Cir. 2006).

¹⁰² 18 U.S.C. § 3771(a)(4).

¹⁰³ *Kenna I*, 435 F.3d at 1013, 1016; *Degenhardt*, 405 F. Supp. 2d at 1345.

¹⁰⁴ 370 F. Supp. 2d 745, 746, 747-48 (N.D. Ill. 2005). *See supra* notes 71-79 discussing the *Marcello* case in more depth.

variety of ways.¹⁰⁵ For example, one could interpret the right to be “reasonably heard” by drawing an analogy between hearing and speaking. In common English, one cannot be heard unless there is sound, presumably through the act of speaking.¹⁰⁶ Conversely, the language “reasonably heard” could be interpreted as a legal term of art, “commonly understood as meaning to bring one’s position to the attention of the decision maker orally *or* in writing.”¹⁰⁷

The courts in *Kenna I* and *Degenhardt* also acknowledged there exists an inconsistency between the CVRA’s language granting victims the right to be reasonably heard, and language which appears in Federal Rule of Criminal Procedure 32(i)(4)(B), granting a specific sub-set of crime victims the right to speak at sentencing.¹⁰⁸ The courts recognized this varying language could

¹⁰⁵ 435 F.3d at 1014; 405 F. Supp.2d at 1345-46; 370 F. Supp. 2d at 748.

¹⁰⁶ In *Kenna I*, the victim contended that the right to be reasonably heard could be defined by looking to a common dictionary which defined “hear” as “to perceive (sound) by the ear.” 435 F.3d at 1014.

¹⁰⁷ *Id.* (emphasis added). See also 405 F. Supp. 2d at 1345; 370 F. Supp. 2d at 748.

¹⁰⁸ 435 F.3d at 1014; 405 F. Supp. 2d at 1346-47. The CVRA grants victims the right to be “*reasonably heard*,” while Rule 32(i)(4)(B) directs that prior to imposing a sentence, “the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to *speak* or submit any information about the sentence.” FED. R. CRIM. P. 32(i)(4)(B) (emphasis added). The federal rule has been subject to criticism and judicial revision. See *e.g.*, 405 F. Supp. 2d at 1342-43 (holding that the CVRA’s broad grant of allocution rights to all victims overrides the federal rule’s more limited right to victims of violent or sexual assaults); Barnard, *supra* note 58 at 40-41 (advocating for a change to the federal rules); Cassell, *supra* note 64 at 856, 886. The rule is currently under review, and amendments have been proposed to delete the language granting allocution rights only to victims of violent or sexual crimes. It is expected that this amendment will be granted, bringing Rule 32(i)(4)(B) into accordance with the CVRA’s grant of sentencing allocution rights to all crime victims. See 405 F. Supp. 2d at 1346 n. 26; Advisory Committee on the Federal Rules of Criminal Procedure, *Proposed Amendments to the Federal Rules of Criminal Procedure to Implement the CVRA*, 19

raise additional questions regarding the scope of the CVRA right. They nonetheless resolved this linguistic inconsistency in favor of a victim’s right to speak by turning to the legislative history of the statute.¹⁰⁹

Consisting of floor statements made by the statute’s two sponsors, Senator Diane Feinstein of California and Senator John Kyl of Arizona, the Senators emphasized that the victim’s right to be reasonably heard was “intended to allow crime victims to directly address the court in person.”¹¹⁰ Senator Kyl also emphasized it was not Congress’ intent that the

term “reasonably” in the phrase “to be reasonably heard,” . . . provide any excuse for denying a victim the right to appear in person and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term “reasonably” is meant to allow for alternative methods of communicating a victim’s views to the court when the victim is unable to attend the proceedings.¹¹¹

Senator Feinstein echoed this sentiment, stating “[o]nly if it is not practical for the victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard.”¹¹²

FED. SENT. R. 144 (2006), 2006 WL 3912226, *3 (hereafter *Proposed Amendments*). Other portions of the Rules are also under review, along with a proffered new rule 43.1, which seek to more fully integrate victims into the criminal process in accord with the CVRA. *See supra Proposed Amendments*, at *4-5.

¹⁰⁹ 435 F.3d at 1015; 405 F. Supp. 2d at 1345. The court in *Marcello* questioned the helpfulness of the CVRA’s legislative history, noting it is extremely limited, consists merely of statements by the law’s primary author and co-sponsor, and lacks any “debate or exchange of ideas that more frequently accompanies the art of law-crafting.” *See* 370 F. Supp. 2d at 749 & n.8. *See also* Baron-Evans, *supra* note 11 at *1; Bierschbach, *supra* note 11 at *2.

¹¹⁰ April 2004 Senate Floor Statement, *supra* note 19 at *4-5 (statement of Senator Kyl).

¹¹¹ *Id.* at *4.

¹¹² *Id.* at *5.

The *Kenna I* and *Degenhardt* courts also reasoned that when victims are granted the specific right to speak, the goals of victim allocution are most efficiently served. A written presentation hardly seems adequate where “victims want the opportunity to force defendants to confront the human toll of their crimes. Such confrontation is only possible in open court, where the victim has an opportunity to stand face-to-face with her victimizer and explain the pain that flowed from the crime.”¹¹³ To interpret the statute otherwise would shortchange the victim allocution goals of empowering the victim and educating the defendant. The CVRA acknowledges that victim allocution should serve to dignify the victim’s personal experience by granting the victim the opportunity to address the court.¹¹⁴ Likewise, by interpreting the victim’s sentencing right as the rite of speaking, the defendant is educated. His understanding of the victim’s experience is not limited to the government’s presentation of evidence, but is broadened by hearing directly from the victim, in her own independent voice.¹¹⁵

¹¹³ 405 F. Supp. 2d at 1348.

¹¹⁴ *See supra* note 94-95 and accompanying text discussing victims’ desire to have their experience with crime and their status of being a victim acknowledged by the court.

¹¹⁵ A lingering practical problem in interpreting the CVRA as granting victims the right to speak must nonetheless be acknowledged. The CVRA explicitly directs that

[i]n a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

18 U.S.C. § 3771(d)(2). Hence, even though a victim may desire to verbally address the court, in certain circumstances, a judge can legitimately deny the victim that opportunity.

Advocates for the CVRA, as well as the courts who hold that the statute grants victims the right to speak, do not address this problem satisfactorily. They celebrate the victim’s right to speak, while minimize the CVRA’s express command that a court can decide otherwise. For example, in *Degenhardt*, the court asserted that victims should never be denied their right to speak at sentencing, while simultaneously acknowledged that the CVRA grants courts the power

D. The correction of victim allocution denials

A rite based approach to victim allocution is also highlighted by how the CVRA treats victim allocution denials. The CVRA’s language, and courts’ interpretation and application of the same, emphasize that when a victim is denied the right to allocute, the error should be corrected. Specifically, and as discussed earlier, victims can seek to enforce their rights under the CVRA by filing a writ of mandamus with the appropriate court of appeals.¹¹⁶ If the court deems an error has occurred, it is to remand the action to the trial court, where the victim can make a motion to re-open the proceedings.¹¹⁷

In *Kenna I*, the court indicated that the CVRA requires courts to issue the writ “whenever we find that the district court’s order reflects an abuse of discretion or legal error.”¹¹⁸ It went on to determine that the district court’s denial of the victim’s right to allocute constituted a legal error requiring correction.¹¹⁹ The court described a victim’s right to speak at sentencing is

to fashion an alternative procedure when faced with a large number of victims. Degenhardt, 405 F. Supp. 2d 1341, 1351 (D. Utah 2005). The statute, by allowing judges to place limits on the number of victims permitted to speak, dampens a rite based approach to allocution, and likewise hampers fulfillment of the proffered dignitary and moral education aspects of the practice. In this regard then, drafters of, and advocates for the CVRA seem to be speaking out of both sides of their mouths. In a loud voice advocates proclaim to victims “Your rights are absolute,” while under their breath they reluctantly mutter “except where impracticable.”

¹¹⁶ 18 U.S.C. § 3771(d)(3). *See also supra* notes 45-51 and accompanying text.

¹¹⁷ *Id.* at § 3771(d)(5)(A)-(C). A victim’s right to request that a sentencing hearing be re-opened is predicated on the victim’s compliance with the procedural requirements of the CVRA. *See* 18 U.S.C. § 3771(d)(5)(A)-(B) (victim must clearly assert rights before district court, and then petition court of appeals for a writ of mandamus within ten days of the district court’s denial of the right).

¹¹⁸ *Kenna I*, 435 F.3d 1011, 1016 (9th Cir. 2006).

¹¹⁹ *Id.*

“indefeasible,”¹²⁰ and that the only way to “give effect to [the victim’s] right to speak as guaranteed . . . by the CVRA [is] to vacate the sentence and hold a new sentencing hearing.”¹²¹ This approach implies that such denials should be treated as reversible error. In essence, when the right has been denied, it must be corrected. Similarly, in *Degenhardt*, in support of its position that courts do not possess the discretion to deny a victim the right to allocution, the court cited a series of cases regarding the review of defendant allocution denials which employed a reversible error standard.¹²² As interpreted by the *Degenhardt* court, the defendant allocution cases served to instruct that the denial of allocution always prejudices the holder of the right and therefore always requires that the right be provided, and by implication, be corrected when denied.¹²³

This broad approach to the correction of errors indicates that victim should always be granted their allocution right, regardless of whether the victim has anything to say which would alter the defendant’s sentence. Hearing from the victim is important not simply because of what the victim may provide to the court, but also because of how the victim and defendant might

¹²⁰ *Id.* BLACKS LAW DICTIONARY defines indefeasible as “[t]hat which cannot be defeated, revoked, or made void.” BLACKS LAW DICTIONARY 529 (6th abridged ed. 1991).

¹²¹ 435 F.3d at 1017.

¹²² 405 F. Supp. 2d 1341, 1350 n.45 (D. Utah 2005) (citing cases).

¹²³ What the court in *Degenhardt* failed to acknowledge in citing the defendant allocution cases was that the reversible error approach does not prevail among the federal courts, and that several of the courts it referenced currently hold to a Rule 52 analysis for defendant allocution denials. Compare *United States v. Walker*, 896 F.2d 295, 301 (8th Cir. 1990) (holding that denial of a defendant’s right to allocute requires a remand for re-sentencing) with *United States v. Griggs*, 431 F.3d 1110, 1114 n4 (8th Cir. 2005) (implying a harmless error analysis is appropriate), and *United States v. Posner*, 868 F.2d 720, 724 (5th Cir. 1989) (treating allocution error as reversible) with *United States v. Reyna*, 358 F.3d 344, 350 (5th Cir. 2004) (rejecting a reversible error approach in favor of a harmless error review). See also *infra* § V.C.

benefit from speaking in the other's presence regarding the crime. Hence, in correcting victim allocution denials, the transformative value of the rite of allocution is emphasized over the calculable impact the victim's speech might have on the defendant's sentence.

In the short period since the passage of the CVRA, courts' interpretation of the statute highlight the new role the Act has created for victims at sentencing. Rejecting the limited and peripheral role relegated to victims under the traditional public prosecution model, the CVRA has provided victims with specific and enforceable participatory rights throughout the criminal process. As courts have begun to provide shape and context to these rights, the general message is that the victim's right to be reasonably heard during the sentencing proceeding serves a variety of broad goals. While victim allocution can serve a utilitarian function in impacting the defendant's sentence, the practice is viewed more expansively as a means by which to honor and acknowledge the victim's encounter with the defendant, as well as the victim's presence in the court system. Providing the victim with the right to speak provides the victim with the opportunity to take a therapeutic step in healing from the effects of the defendant's wrongful acts and establish a new moral balance between herself and the defendant. Likewise, the practice serves as a means to educate the defendant as to the broader consequences of his criminal choices. Hence, the transformative nature of the rite of allocution is emphasized.

However, when one compares the victim's right to allocution with the defendant's comparable right, a similar equality cannot be as easily drawn between the two practices. As the next section of this paper discusses in more depth, the predominant theme drawn from the practice of defendant allocution is that the defendant's right to allocute is predicated largely on an assumption that what the defendant has to say could impact his sentence. In essence, defendant allocution is based on a theory of relevancy, rather than viewing the practice as furthering broader transformative goals.

V. DEFENDANT ALLOCUTION

A. The common law history of defendant allocution

In contrast to the relatively modern history of victim allocution, the defendant's right to allocute at sentencing has been an integral part of the criminal justice system for centuries.¹²⁴ "Ancient in law, allocution is both a rite and a right,"¹²⁵ and the practice has been described in such laudatory terms as a "right . . . of immemorial origin,"¹²⁶ "a rule so highly prized,"¹²⁷ an "elementary right,"¹²⁸ and a "precious fruit."¹²⁹ Despite the majestic manner in which the practice is described, modern courts tend to provide only a basic explanation of what is entailed in a defendant's right to allocute and do not engage in extensive discussions of why the right is

¹²⁴ See Paul W. Barrett, *Allocution*, 9 MISSOURI L. REV. 115 (1944). See also A. CAMPBELL, LAW OF SENTENCING § 9:5 at 245 (2d. ed. 1991); ANDREW KLEIN, ALTERNATIVE SENTENCING: A PRACTITIONER'S GUIDE 46 (1988); Jonathan Scofield Marshall, *Lights, Camera, Allocution: Contemporary Relevance of Director's Dream?*, 62 TUL. L. REV. 207, 209-10 (1987); Caren Myers, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 COLUM. L. REV. 787, 798-99 (1997); Kevin Francis O'Neill, *Muzzling Death Row Inmates: Applying the First Amendment to Regulations that Restrict a Condemned Prisoner's Last Words*, 33 ARIZ. ST. L. J. 1159, 1178-80 (2001); Kimberly A. Thomas, *Beyond Mitigation: Toward a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2645-47 (2007); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 832-33 (1968); WAYNE R. LAFAVE, CRIMINAL PROCEDURE 1231 (3d ed., West Group 2000).

¹²⁵ *United States v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1994).

¹²⁶ *McGuatha v. California*, 402 U.S. 183, 217 (1971).

¹²⁷ *United States v. Green*, 365 U.S. 301, 311 (1961) (Black, J., dissenting).

¹²⁸ *United States v. Behrens*, 375 U.S. 162, 167 (1963) (Harlan, J., concurring).

¹²⁹ *Robalewski v. Superior Court*, 197 A.2d 751, 753 (R.I. 1964), *superseded by rule as stated in State v. DeCiantis*, 813 A.2d 986 (R.I. 2003).

described so grandly. Often, a description of the right also serves as its justification,¹³⁰ leaving one to glean from court rulings why allocution is deemed a “precious fruit.”¹³¹

¹³⁰ This is no where better highlighted than in the Supreme Court’s primary decision regarding defendant allocution. *See Green*, 365 U.S. 301. In *Green*, the Court identified two rights comprising defendant allocution: the right of the defendant to speak on his own behalf, and the right to present evidence in mitigation of his sentence. *Id.* at 304. In describing why these rights exist, however, the Court merely rearticulated that a defendant has a personal need “to have the opportunity to present to the court his plea in mitigation.” *Id.* The Court did not specifically detail why the two rights should exist, whether they serve separate or combined purposes, or how a court should respond if one, but not both rights are denied. *See also infra* notes 149-52 and accompanying text, discussing *Green*.

¹³¹ Robalewski, 197 A.2d at 753. Just as one must carefully cull from court rulings justifications for the right’s existence, only a limited body of scholarship exists studying the defendant’s right. Paul W. Barrett’s work, *Allocution*, published over sixty years ago, serves as the most comprehensive examination of defendant allocution in England and the United States. Barrett, *supra* note 122. Professor Barrett’s study focused primarily on the history of defendant allocution, and its use in American state courts, but did not devote much attention to why the right exists in modern practice.

Since Professor Barrett’s work, the practice of defendant allocution has received only selective treatment from scholars and practitioners. *See*, A.G. Barnett, Annotation, *Necessity and Sufficiency of Question to Defendant as to Whether He has Anything to Say Why Sentence Should not be Pronounced Against Him*, 96 A.L.R.2d 1292 (1964); Marshall, *supra* note 122 at 209-10 (raising questions about the usefulness of defendant allocution); Myers, *supra* note 122 at 798-99 (arguing for broader allocution rights for defendants in capital trials); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U.L. REV. 1449 (2005) (advocating for more defendant speech, including allocution, during the criminal process); O’Neill, *supra* note 122 at 1178-80 (arguing for broader allocution rights for defendants in capital trials). Recently however, Professor Kimberly A. Thomas has made a valuable contribution to the discourse regarding defendant allocution by engaging in a thoughtful study regarding modern justifications for the right. Thomas, *supra* note 122 at 2645-47.

English case law dating from as early as 1689 discusses defendant allocution with limited fanfare,¹³² as do legal commentators from the Nineteenth Century.¹³³ Generally, the right was afforded to a defendant who was found guilty of a capital felony or treason charge.¹³⁴ Prior to sentencing, the court was required to ask the defendant something akin to the following question: “Do you know of any reason why judgment should not be pronounced upon you?”¹³⁵ In response, the defendant could raise a limited set of arguments in an attempt to escape judgment.¹³⁶ These arguments included pregnancy,¹³⁷ insanity,¹³⁸ misidentification,¹³⁹ benefit of clergy,¹⁴⁰ and the request for pardon.¹⁴¹

¹³² Anonymous, 3 Mod. 265 (K. & Q.B. 1682-1690); Rex & Regina v. Geary, 2 Salk. 630 (K.B. 1689-1712); King v. Speke, 3 Salk. (K.B. 1689-1712); Rex v. Royce, 4 Burr. 2073, 2086 (K.B. 1716). *See also* Barrett, *supra* note 122 at 121-23 (discussing English cases).

¹³³ 1 JOHN FREDERICK ARCHBOLD, A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE 577 (New York, Banks & Brothers 1877); 2 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE 1129-30 (1913); 2 WILLIAM BLACKSTONE, COMMENTARIES *375; 1 CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *700; 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 487 (London, MacMillan 1883); 5 RONALD ABERDEEN ANDERSON, WHARTON’S CRIMINAL LAW AND PROCEDURE 376 (12th ed., Lawyers Co-operative Publishing Co., 1957) (hereafter WHARTON).

¹³⁴ *See* ARCHBOLD, *supra* note 131 at 577; BISHOP, *supra* note 131 at 1129; BLACKSTONE, *supra* note 131 at *735; Barrett, *supra* note 122 at 126-40; John H. Dawson, Note, *Federal Rules of Criminal Procedure – Court Should Afford Defendant a Personal Opportunity to Speak Before Sentence is Announced*, 6 AM. U. L. REV. 117 (1957).

¹³⁵ *See* ARCHBOLD, *supra* note 131 at 577; WHARTON, *supra* note 131 at 376; Barrett, *supra* note 122 at 115; Thomas, *supra* note 122 at 2646.

¹³⁶ BLACKSTONE, *supra* note 131 at *375-76; CHITTY, *supra* note 131 at *700; Barrett, *supra* note 122 at 120-21.

¹³⁷ *See* Barrett, *supra* note 122 at 121. In this regard, a woman was spared her sentence until she gave birth to her child.

At common law, when the court addressed the defendant at sentencing, it generally represented the defendant's only opportunity to present his case and be heard by the court. Unlike modern American practice, common law criminal defendants were not guaranteed the right to counsel and were denied the right to speak on their own behalf.¹⁴² Allocution was therefore often the sole means for the defendant to personally present legal defenses or mitigating evidence in answer to the charge against him.¹⁴³ Without affording a defendant the right to allocution, the individual might be sentenced to death without ever having the

¹³⁸ See CHITTY, *supra* note 131 at *761; Barrett, *supra* note 122 at 121.

¹³⁹ See CHITTY, *supra* note 131 at *698; Barrett, *supra* note 122 at 120-21.

¹⁴⁰ See Barrett, *supra* note 122 at 120. Initially, this claim was limited solely to members of the clergy on the ground that they were exempt from the secular, criminal court jurisdiction. See Thomas, *supra* note 122 at 2646. However, this defense was eventually expanded to those who could read, and subsequently became a claim broadly available to all individuals. BLACKSTONE, *supra* note 131 at *365-74; CHITTY, *supra* note 131 at 698; STEPHEN, *supra* note 131 at 487; Barrett, *supra* note 122 at 120 n. 23.

¹⁴¹ BISHOP, *supra* note 131 at 1130; BLACKSTONE, *supra* note 131 at *375; CHITTY, *supra* note 131 at *700; Barrett, *supra* note 122 at 120. Pardon could be rendered by the crown or parliament by grace, or by purchase, which was often the case. See Barrett, *supra* note 122 at 120 n.23.

¹⁴² See United States v. Green, 365 U.S. 301, 304 (1961); Robalewski v. Superior Court, 197 A.2d 751, 753 (R.I. 1964) (noting that at common law, a defendant did not have the right counsel upon a plea of guilty as to issues of fact in felony and treason cases); Barnett, *supra* note 129 at § 3. *But see* Barrett, *supra* note 122 at 122-23 & n.39, 39a, discussing Rex v. Royce, 4 Burr. 2073 (K.B. 1767), in which the defendant was represented by counsel.

¹⁴³ See Thomas, *supra* note 122 at 2469, 2655-56.

opportunity to speak to the court.¹⁴⁴ Hence, it was generally accepted that a defendant's right to speak prior to being sentenced was indispensable, the denial of which required voiding the judgment, and in more modern practice, re-sentencing.¹⁴⁵

Over time, the practice of defendant allocution evolved. Defendants were no longer limited to raising a particular set of legal arguments to escape judgment, but were granted the general opportunity to plead for mercy before the court.¹⁴⁶ Concurrently, in American courts, defendants possessed the added advantage of the guarantee of assistance of counsel,¹⁴⁷ and the

¹⁴⁴ Unlike modern American legal practice, where the death penalty is available only for homicides, at English common law the punishment of death was applicable to all crimes except petty larceny and mayhem. *See* STEPHEN, *supra* note 131 at 487.

¹⁴⁵ *See* Dawson, *supra* note 134, at 117-18. *See also infra* § V.C, regarding how defendant allocution errors generally are corrected. *See* BLACKSTONE, *supra* note 131 at *375 (“And if the objections be valid, the whole proceedings may be set aside; but the party may be indicted again.”); WHARTON, *supra* note 131 at 376 (“failure to afford the defendant such an opportunity [of allocution] invalidated and required the setting aside of judgment.”); BISHOP, *supra* note 131 at 1130 (“While it is error to omit this form, the entire record need not therefore be reversed, but only this part, and thereupon a new sentence under due steps may be given.”); Barrett, *supra* note 122 at 117-121.

¹⁴⁶ *See* BISHOP, *supra* note 131 at 1129 (“defendant must be asked whether he has anything to say why [sentence] should not be rendered”); CHITTY, *supra* note 131 at *700 (“If he has nothing to urge in bar, he frequently address the court in mitigation of his conduct, and desires their intercession with the king, or casts himself upon their mercy.”); ARCHBOLD, *supra* note 131 at 577 (defendant may “address any other observations to the judge which he may think proper” and “may address the court in mitigation of punishment”); Barrett, *supra* note 122 at 124-140 (discussing allocution practice in the state courts); NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR SENTENCING 43 (2d. ed. 1974).

¹⁴⁷ U.S. CONST. amend. VI.

opportunity to speak on their own behalf at trial.¹⁴⁸ Likewise, far fewer crimes were subject to the punishment of death. In light of these shifts, the original reasons for defendant allocution lost their relevancy. Appointed or retained counsel could fulfill the goals of common law allocution by making arguments at trial and at sentencing, by challenging information contained in pre-sentence reports, and by filing post judgment appeals.¹⁴⁹ Hence, commentators have questioned whether the right has turned into an “idle ceremony” and “ancient formality” whose purposes are better fulfilled by modern procedural practice.¹⁵⁰

The waning original justifications for a defendant’s common law right of allocution did not go unnoticed by the Supreme Court in its primary opinion on defendant allocution, *United States v. Green*.¹⁵¹ Charting the history of the right, the Court commented that it was “not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century.”¹⁵² Nonetheless, the Court stated that

we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of [the]

¹⁴⁸ See *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

¹⁴⁹ See *Thomas*, *supra* note 122 at 2649.

¹⁵⁰ See *e.g.*, *Barnett*, *supra* note 129 at § 3 (“In many American jurisdictions the practice of allocution has been codified in statutes or court rules, but except where this has been done it is apparent that the tendency is to regard the practice as a technical formality of little importance in modern criminal procedure, where other procedural devices afford the accused ample opportunity to protect himself at all stages of the proceeding.”); *Barrett*, *supra* note 122 at 124 (noting concession by English authority that “common law circumstances necessitating [allocution] no longer existed”); *Dawson*, *supra* note 134 at 118 (“a few courts treat the practice as an outmoded ceremony which is no longer necessary in the administration of criminal justice”).

¹⁵¹ 365 U.S. 301 (1961).

¹⁵² *Id.* at 304.

modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.¹⁵³

The Court therefore affirmed the importance of the sentencing right, holding that it included two components, the right of the defendant to speak on his own behalf, and the right to present information in mitigation of punishment.¹⁵⁴

B. The modern practice of defendant allocution

Since its decision in *Green*, the Supreme Court has said very little about defendant allocution.¹⁵⁵ The lower federal courts, however, have been far more active in discussing the scope and practice of the right. The following review of federal case law builds upon the limited scholarship existing regarding modern defendant allocution and seeks to flesh out the current practices of and theories underlying the right. In surveying the existing federal case law,¹⁵⁶ it becomes evident that unlike victim allocution under the CVRA, modern defendant allocution is justified primarily by its mitigating role in the calculation of the defendant's sentence.¹⁵⁷

¹⁵³ *Id.*

¹⁵⁴ *Id.* See also *supra* note 128.

¹⁵⁵ The Court has made passing reference to the defendant's right in *Peguero v. United States*, 526 U.S. 23, 28 (1999); *Groppi v. Leslie*, 404 U.S. 496, 501 (1972); *United States v. Behrens*, 375 U.S. 162, 165 (1963); *Andrews v. United States*, 373 U.S. 334, 336-37 (1963); *Machibroda v. United States*, 368 U.S. 487, 489 (1962); and *Van Hook v. United States*, 365 U.S. 609, 609 (1961). The Court discussed the right in a bit more depth in *United States v. Hill*, 368 U.S. 424 (1962), but has said very little to build upon why it deems the right important.

¹⁵⁶ This study will also contain occasional references to relevant state court decisions.

¹⁵⁷ Professor Thomas, in her article *Beyond Mitigation: Towards a Theory of Allocution*, *supra* note 122, identifies this prevailing theory. *Id.* at 2655.

The defendant’s right to allocute is currently detailed in Rule 32 of the Federal Rules of Criminal Procedure. The rule states that “before imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence.”¹⁵⁸ When the Supreme Court decided *Green* in 1961, Rule 32’s command regarding defendant allocution read slightly differently than it does today. The rule required that “[b]efore imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.”¹⁵⁹ Recognizing that there could be instances where it might not be entirely clear whether a judge directly granted a defendant the opportunity to speak,¹⁶⁰ the Court commanded that “[t]rial judges before sentencing should, as a matter of good judicial administration, unambiguously

¹⁵⁸ FED. R. CRIM. P. 32(i)(4)(A)(ii). Originally promulgated in 1944, the portion of Rule 32 which addressed defendant sentencing rights “was substantially a restatement of existing procedure.” FED. R. CRIM. P. 32, advisory committee notes. From 1944 until 1966, the right was listed in Rule 32(a). From 1966 until 1989, the rule’s numeration shifted to Rule 32(a)(1). In 1989, amendments to Rule 32 again shifted the allocution language to Rule 32(a)(1)(C). In 1994, further amendments to the rule moved the language to Rule 32(c)(3)(C). As referenced above, a defendant’s right to allocution currently can be found in Rule 32(i)(4)(A)(ii). Its language, however, has remained constant since 1966. *See* FED. R. CRIM. P. 32, advisory committee notes. In attempt to reduce confusion regarding the roving placement of the right within the rule, I will limit general reference to the right as “Rule 32.” I will nonetheless honor older citations to the rule as it appears in specific cases.

¹⁵⁹ *See* FED. R. CRIM. P. 32(a) (1944).

¹⁶⁰ In *Green*, there was indeed the question of whether the trial court’s statement “Did you want to say something,” 365 U.S. 301, 304 (1961), was addressed to the defendant or to his attorney. In declining to award relief to the defendant, the Court concluded the defendant had failed to meet his burden in proving that the trial court was not speaking to him when it posed its question. *Id.* at 305. *See also supra* notes 149-52 and accompanying text.

address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing.”¹⁶¹ In response to the Court’s ruling, Congress amended Rule 32 to its present form which now specifically directs that “before imposing sentence, the court must . . . *address the defendant personally* in order to permit the defendant to speak or present any information to mitigate the sentence.”¹⁶²

Taking heed of the Supreme Court’s admonition that judges “unambiguously address themselves to the defendant,”¹⁶³ the federal appellate courts are emphatic that Rule 32 be followed with particularity.¹⁶⁴ Conversations between the court and defense counsel are not sufficient to satisfy the right.¹⁶⁵ Instead, it must be evident to all involved, especially the

¹⁶¹ *Id.*

¹⁶² FED. R. CRIM. P. 32(i)(4)(A)(ii) (emphasis added).

¹⁶³ 365 U.S. at 304.

¹⁶⁴ *See e.g.*, *United States v. Magwood*, 445 F.3d 826, 829 (5th Cir. 2006) (Rule 32 must be applied “quite literally”); *United States v. Phillips*, 936 F.2d 1252, 1255 (11th Cir. 1991) (courts should adhere strictly to Rule 32); *United States v. Pelaez*, 930 F.2d 520, 522-23 (6th Cir. 1991) (requiring literal compliance with Rule 32); *United States v. Miller*, 849 F.2d 896, 897 (4th Cir. 1988) (“we think a bright-line approach is mandated by the clear language of Rule 32”); *United States v. Buckley*, 847 F.2d 991, 1001 (1st Cir. 1988) (“The rule mandates precisely what it appears to mandate: a personal inquiry directed to the defendant himself.”); *United States v. Dickson*, 712 F.2d 952, 956 (5th Cir. 1983) (Rule 32 literally mandates the court direct a personal inquiry to the defendant).

¹⁶⁵ *See e.g.*, *United States v. Lewis*, 10 F.3d 1086, 1092 (4th Cir. 1993) (“Merely affording the Defendant’s counsel the opportunity to speak does not fulfill the requirements of Rule 32(a).”); *Dickson*, 712 F.2d at 955-56 (“The point of allocution is to allow a criminal defendant the opportunity to speak for himself, rather than through the mouth of counsel.”). *See also* *United States v. Walker*, 896 F.2d 295, (8th Cir. 1990) (it is the sentencing court’s responsibility to address the defendant, not the defendant’s duty to raise the issue of allocution to the sentencing

defendant, that he could speak to the court prior to the pronouncement of his sentence.¹⁶⁶ The sentencing judge, in turn, is required to listen carefully to what the defendant has to say.¹⁶⁷ By requiring the sentencing judge to listen with care to the defendant's statement, courts emphasize that the defendant's opportunity for allocution should not be viewed as an empty ritual, but rather as a vital and integral part of the sentencing process.¹⁶⁸ Hearing from the defendant, therefore,

court); *United States v. Sparrow*, 673 F.2d 862, 864 (5th Cir. 1982) (courts' statement regarding allocution to a group of defendants was insufficient to satisfy requirements of right).

¹⁶⁶ *United States v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1991). Rule 32 also specifically grants the defense and government counsel the opportunity to speak. FED. R. CRIM. P. 32(i)(4)(A)(i), (iii).

¹⁶⁷ *United States v. Mack*, 200 F.3d 653, 658 (9th Cir. 2000) ("In exercising the right to allocution . . . the district court has a duty to listen and give careful consideration [to the defendant's statement.]"); *United States v. Li*, 115 F.3d 125, 133 (2d Cir. 1997) ("the Rule demands that each defendant be allowed a meaningful right to express relevant mitigating information before an attentive and receptive district judge"); *United States v. Sarno*, 73 F.3d 1470, 1503-04 (9th Cir. 1995) (court's sharp comments to defendant in early portion of sentencing hearing were sufficient to cause defendant to be timid in his efforts to exercise his allocution rights; court inspired-reticence on behalf of the defendant was sufficient to violate right of allocution); *Pelaez*, 930 F.2d at 524 (right to allocution denied where court indicated it was unwilling to reconsider defendant's sentence based on statements made by defendant at re-sentencing hearing); *Sparrow*, 673 F.2d 862, 865 (5th Cir. 1982) (defendant's right to allocution denied, in part, where sentencing judge made caustic comments regarding its unwillingness to consider any statement made by defendant).

¹⁶⁸ *United States v. Riascos-Suarez*, 73 F.3d 616, 627 (6th Cir. 1996) (re-sentencing after violation of allocution rights is not to be a "hollow exercise in which [the defendant] is given the opportunity to speak but the same sentence is perfunctorily applied"); *United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991) ("Because the sentencing decision is a weighty responsibility, the defendant's right to be heard must never be reduced to a formality. In an age of staggering crime rates and an overburdened justice system, courts must continue to be cautious to avoid the

matters. How courts define “what matters” however, generally focuses on the mitigating influence the defendant’s speech may have on his sentence.

A mitigation based approach to defendant allocution is evident in how courts value the content of a defendant’s allocution statement. Courts appear willing to hear from remorseful and apologetic defendants, but are quick to cut off defendants who attempt to use their allocution right to re-argue their case,¹⁶⁹ to challenge the court, judicial system, or government, or who continue to protest their innocence. For example, in *United States v. Burgos-Andujar*,¹⁷⁰ the court highlighted the judicial predisposition of hearing from a remorseful defendant. There, the defendant, a legislator in the Puerto Rican Senate, was found guilty of criminal trespass in United States naval territory. She, along with others, had protested military exercises on a local island.¹⁷¹ The defendant was afforded her right to allocution, during which she claimed her innocence, challenged the authority of the court, as well as the evidence it relied upon in finding her guilty.¹⁷² As a result of defendant’s allocution, the judge raised her sentence from that which

appearance of dispensing assembly-line justice.”); *United States v. Serhant*, 740 F.2d 548, 554 (7th Cir. 1984) (“Where a sentencing judge has complied with Rule 32(a)(1) only in form, vacation of the sentence and remand for re-sentencing may be ordered.”); *Sparrow*, 673 F.2d at 865 (“Even where the judge satisfies the specifics of Rule 32, we must still assure ourselves that the compliance was not merely in form.”). *Cf.* *United States v. Dominguez-Hernandez*, 934 F.2d 598, 599 (5th Cir. 1991) (in remanding case for re-sentencing in light of allocution error, court expressed concern that remand “may well be a useless bow to a procedural nicety”). *See also supra* note 166, discussing concerns that allocution no longer serves a relevant purpose.

¹⁶⁹ *United States v. Muniz*, 1 F.3d 1018, 1025 (10th Cir. 1993).

¹⁷⁰ 275 F.3d 23 (1st Cir. 2001).

¹⁷¹ *Id.* at 26-27.

¹⁷² *Id.* at 27.

was originally contemplated by the court.¹⁷³ On appeal, the reviewing court acknowledged that a sentencing court must provide the defendant with an opportunity to present “any information in mitigation of sentence,”¹⁷⁴ and permit “the defendant to speak on *all* topics which the defendant considers relevant.”¹⁷⁵ *Id.* The court also determined that the defendant was afforded this right. However, as noted by the appellate court, the defendant’s allocution did not have the desired effect of reducing her sentence. She

essentially declared herself innocent of crime and thus . . . refus[ed] to acknowledge the impact of her illegal action. . . . [S]he [also] disparaged the validity of the law she broke, accusing the United States Navy of breaking the greater law. Her statements certainly suggest a lack of remorse, and even a likelihood of repeating her illegal actions. Any of these reasons may have legitimately led the sentencing judge to increase appellant’s sentence.¹⁷⁶

Similarly, court’s distaste for defiant defendants or those who challenge the legal system was displayed in *United States v. Mitchell*.¹⁷⁷ In *Mitchell* the defendant had been found guilty of failing to report for military duty and spoke before the court at sentencing. The appellate court described his statements as

an intemperate harangue concerning his personal views on moral questions. It went far beyond the bounds of propriety; it was of matters in no way relevant to the prosecution and far exceeded his right to allocution, a right to make a statement on his own behalf or in mitigation of punishment. . . . Allocution does not grant a defendant the right to enter into a diatribe of the Sentencing Judge, or of the Court, or of the judicial system of which he is a part. It is not a time for

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 28.

¹⁷⁵ *Id.* (emphasis added).

¹⁷⁶ *Id.* at 30. *See also* Natapoff, *supra* note 129 at 1467-69 (discussing how a defendant’s attempt to explain his actions to the court can be misinterpreted as claiming innocence); Thomas, *supra* note 122 at 2661-66 (commenting that allocution statements of innocence or defiance are not well received by courts).

¹⁷⁷ 392 F.2d 214 (2d Cir. 1968),

platform speeches on either philosophical, religious or political issues. . . . The time of imposition of sentence is not a public forum to be used by either a defendant or his attorney for that purpose.¹⁷⁸

These cases not only display court's distaste for anything but a remorseful apology from the defendant, but highlight the continued prevalence of the mitigation theory to support defendant allocution. Courts are interested in hearing from defendants if what the defendant has to say might lessen his sentence. Otherwise, the message is that defendants best stay quiet.

The dominance of a mitigation based theory for defendant allocution, however, is not entirely without reason.¹⁷⁹ By focusing on whether there are grounds upon which a court might reduce a defendant's sentence, the practice serves both the defendant and the sentencing judge.¹⁸⁰ The defendant is provided one final opportunity to attempt to make a difference to his sentence, whether through pleas of mercy,¹⁸¹ or with statements which would allow the court to ensure that the sentence is specific and appropriate to the defendant.¹⁸² Likewise, the judge is afforded

¹⁷⁸ *Id.* at 215-16. *See also* Mack, 200 F.3d at 658 (court did not deny defendants' right to allocution where the court asked that the defendants not discuss their motives, philosophies, and beliefs on issues that did not pertain to mitigating their sentence); United States v. Kellog, 955 F.2d 1244, 1250 (9th Cir. 1992) (court did not violate defendant's right to allocution where court interrupted defendant during his discussion of "giant loopholes" which exist in the tax laws and his opinion that the IRS was incompetent).

¹⁷⁹ *See* Thomas, *supra* note 122 at 2655-57.

¹⁸⁰ Watts v. DuBois, 660 F. Supp. 1246, 1249 (D. Colo. 1987).

¹⁸¹ *See e.g.*, United States v. Prouty, 303 F.3d 1249, 1251 (11th Cir. 2002) ("Allocution is the right of the defendant to make a final plea on his own behalf to the sentencer before the imposition of a sentence."); United States v. Quintana, 300 F.3d 1227, 1231 (11th Cir. 2002) (one of the values served by allocution is giving a defendant the opportunity to seek mercy); Burgos-Andujar, 275 F.3d at 28-29 (Right to allocution "reflects our long tradition of giving all defendants the right to directly address the court and plead for mercy."); United States v. Dabeit,

the opportunity to evaluate the total person who stands at the bar of justice: to note the physical appearance and demeanor; the tone, temper, and rhythm of speech, the facial expressions, the hands, the revealing look into the eyes. In sum, [without allocution the judge is deprived of] those impressions gleaned through the senses in any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another.¹⁸³

The predominance of the mitigation theory is equally evident in how courts decide to correct defendant allocution denials.

C. The correction of defendant allocution denials

The majority of courts reviewing allocution errors invoke Federal Rule of Criminal Procedure 52.¹⁸⁴ Rule 52 details the standards of review for direct appeal in the federal courts. It

231 F.3d 979, 981 (5th Cir. 2000) (allocution serves, in part, to give defendant opportunity to ask for mercy); *United States v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1994) (“The right of allocution . . . is designed to temper punishment with mercy in appropriate cases . . .”); *United States v. Barnes*, 948 F.2d 325, 328 (7th Cir. 1991) (“The right to allocution is the right to have your request for mercy factored into the sentencing decision.”); NATIONAL COUNSEL ON CRIME AND DELINQUENCY, GUIDES FOR SENTENCING 43 (2d ed. 1974).

¹⁸² *Quintana*, 300 F.3d at 1231 (“defendant will know that the court has heard the defendant’s own perspective and taken into account defendant’s individual circumstances”); *United States v. Adams*, 252 F.3d 276, 287 (3d Cir. 2001) (denial of allocution denies the court “the opportunity to take into consideration [the defendant’s] unique perspective on the circumstances relevant to his sentence”); *United States v. Tamayo*, 80 F.3d 1514, 1581 (11th Cir. 1996) (“Allocution serves an important function at initial sentencing, where the district court exercises its discretion in determining an appropriate sentence.”); *De Alba Pagan*, 33 F.3d at 129 (allocution “is designed . . . to ensure that sentencing reflects individualized circumstances.”); *Barnes*, 948 F.2d at 328 (allocution helps “ensure that sentencing is particularized and reflects individual circumstances”).

¹⁸³ *Del Piano v. United States*, 575 F.2d 1066, 1069 (3d Cir. 1978).

¹⁸⁴ *But see infra* notes 236-42, regarding those courts which review defendant allocution denials under a reversible error approach.

commands that “any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded,”¹⁸⁵ and that “a plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”¹⁸⁶

One must note the curious fact that the Supreme Court, in addressing defendant allocation denials in its decisions of *Green*, *United States v. Hill*,¹⁸⁷ and *Van Hook v. United States*,¹⁸⁸ made no reference to Rule 52. The Court’s silence regarding Rule 52 may have been based on its understanding that the rule did not categorically apply to all trial or sentencing errors, and that therefore, a reversible error approach was appropriate for allocation denials.¹⁸⁹ At the time of the *Green*, *Hill*, and *Van Hook* decisions, the law was unsettled as to whether Rule 52 applied to all claimed errors, or whether there existed a sub-set of errors requiring automatic reversal or remand.¹⁹⁰ However, in its 1993 decision of *United States v. Olano*,¹⁹¹ the Supreme Court strongly implied that Rule 52 was the appropriate means by which to correct all trial and sentencing errors.¹⁹² The Court’s subsequent opinion in *Johnson v. United States*,¹⁹³ solidified

¹⁸⁵ FED. R. CRIM. P. 52(a) (harmless error).

¹⁸⁶ FED. R. CRIM. P. 52(b) (plain error).

¹⁸⁷ 368 U.S. 424 (1962).

¹⁸⁸ 365 U.S. 609 (1961).

¹⁸⁹ *See* *United States v. Reyna*, 358 F.3d 344, 349-50 (5th Cir. 2004) (speculating as to why Supreme Court did not discuss Rule 52 in its key allocation cases); *United States v. Adams*, 252 F.3d 276, 281-83 (3rd Cir. 2001) (same).

¹⁹⁰ *Reyna*, 358 F.3d at 349-50; *Adams*, 252 F.3d at 283.

¹⁹¹ 507 U.S. 725 (1993).

¹⁹² *Id.* at 731-33 (“Rule 52(b) defines a single category of forfeited, but reversible error.”).

¹⁹³ 520 U.S. 461, 466 (1997).

this position.¹⁹⁴ The appellate courts which apply a Rule 52 standard of review imply that in conjunction with the Supreme Court's evolving jurisprudence regarding Rule 52, allocution errors should be brought within the rule's ambit.¹⁹⁵ How courts apply Rule 52 to allocution denials nonetheless varies.

¹⁹⁴ Both *Olano* and *Johnson* dealt with questions arising under Rule 52(b)'s plain error analysis, but there is little question that when reviewing timely raised errors, Rule 52(a) applies. *See Neder v. United States*, 527 U.S. 1, 7 (1999); *Johnson*, 520 U.S. at 466; *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988), *United States v. Lane*, 474 U.S. 438, 488 n. 11 (1986). The only exception to the default application of harmless or plain error review arises in the context of "structural errors." *See Neder*, 527 U.S. at 7-8; *Johnson*, 520 U.S. at 468-69. These include where the defendant was completely denied the assistance of counsel or the right to self-representation; where a biased judge oversaw the proceedings; the grand jury selection was influenced by racial discrimination; the defendant was denied a public trial; or where a defective reasonable-doubt instruction was given to the jury. *Id.*

¹⁹⁵ *See Reyna*, 358 F.3d at 350 ("decisions from the Supreme Court strictly applying Rule 52 regardless of the seriousness of the claimed error lead us to conclude that we should reexamine [our position] that on direct appeal the defendant is automatically entitled to re-sentencing when he is not afforded his right of allocution," and employ Rule 52 instead); *Adams*, 252 F.3d at 283-84 (same). Other courts, without engaging in a significant analysis of the issue, appear to agree. *See e.g.*, *United States v. Mack*, 200 F.3d 653, 657 (9th Cir. 2000) ("This court reviews for harmless error a district court's failure to afford the right of allocation [sic] at sentencing."); *United States v. Cole*, 27 F.3d 996, 998 (4th Cir. 1994) (applying plain error review).

The courts are not always consistent, however, in their invocation of a Rule 52 analysis. The Sixth and Eleventh Circuits vary in their practice. *Compare United States v. Pelaez*, 930 F.2d 520, 524 (6th 1991) (reversible error) *with United States v. Riascos-Suarez*, 73 F.3d 616, 627 (6th Cir. 1996) (court stated it was applying a reversible error approach, but in analyzing the issue, the court relied on authority from circuits who take a harmless or plain error approach, and engaged in a prejudice analysis similar to that required under Rule 52), *abrogated on other grounds as referred in United States v. Nance*, 40 Fed. Appx. 59 (6th Cir. 2002). Likewise, in

1. The Rule 52 question of prejudice

A Rule 52 inquiry asks whether the claimed error affected the defendant's substantial rights. In addressing this question, courts examine whether the error affected the outcome of the trial court's proceedings so to prejudice the defendant.¹⁹⁶ Several courts have been reluctant to cast the prejudice net too broadly, holding that if a defendant is sentenced at the lowest end of the applicable Guideline range, and he or his lawyers did not make any arguments to the court for why a departure from the range was warranted, then the defendant was not prejudiced by the denial of his allocution right.¹⁹⁷ These courts reason that if the defendant received the lowest sentence possible, despite not being given the right to allocute, the denial of the right made no

United States v. Taylor, 11 F.3d 149, 152 (11th Cir. 1994) and *United States v. Phillips*, 936 F.2d 1252, 1256 (11th Cir. 1991), the courts employed a reversible error approach while in a series of other cases, the court declined to correct allocution errors unless the defendant could show he had suffered "manifest injustice." See *United States v. Prouty*, 303 F.3d 1249, 1252, 1253 (11th Cir. 2002); *United States v. Quintana*, 300 F.3d 1227, 1231-32 (11th Cir. 2002); *United States v. Gerrow*, 232 F.3d 831, 834 (11th Cir. 2000); *United States v. Ramsdale*, 179 F.3d 1320, 1324 (11th Cir. 1999); *United States v. Rodriguez-Velasquez*, 132 F.3d 698, 700 (11th Cir. 1998). See also *infra* note 197 regarding the Eleventh Circuit's manifest injustice standard.

¹⁹⁶ *Olano*, 507 U.S. at 734; *Adams*, 252 F.3d at 285.

¹⁹⁷ *Riascos-Suarez*, 73 F.3d at 627-28 (where defendant was denied right to allocute and did not receive shortest sentence allowed by statute, case should be remanded for re-sentencing); *United States v. Lewis*, 10 F.3d 1086, 1092 (4th Cir. 1993) (defendant did not suffer prejudice when he received lowest sentence possible); *United States v. Mejia*, 953 F.2d 461, 468 (9th Cir. 1991) (same), *abrogated on other grounds recognized by United States v. Caperna*, 251 F.3d 827 (9th Cir. 2001).

difference to his sentence, and hence there was no prejudice.¹⁹⁸ In essence, the lack of defendant allocution did not, and would not, matter.¹⁹⁹

¹⁹⁸ This argument may be undercut somewhat by the increased discretion now afforded to judges under *United States v. Booker*, 543 U.S. 320 (2005). Prior to the Supreme Court’s decision in *Booker*, a defendant’s ability to seek flexibility or alter his sentence under the United States Sentencing Guidelines was limited. However, by moving away from a mandatory application of the Guidelines as directed by *Booker*, defendants may have far more room to argue for, and receive, sentences that fall outside a prescribed sentencing range. From a mitigating perspective, defendant allocution may “matter” far more in a post-*Booker* world. Even if a defendant is sentenced at the bottom of a Guideline range, there is always the chance that the court could have departed downward. Thomas, *supra* note 122 at 2653-55.

¹⁹⁹ The Eleventh Circuit has adopted this same general approach, claiming remand for re-sentencing is appropriate only where the defendant has suffered “manifest injustice.” *See e.g.*, Prouty, 303 F.3d at 1253; Quintana, 300 F.3d at 1231-32; Gerrow, 232 F.3d at 834; Ramsdale, 179 F.3d at 1324; Rodriguez-Velasquez, 132 F.3d at 700. Manifest injustice arises when the defendant did not receive the lowest possible sentence within his Guideline range. *See* Quintana, 300 F.3d at 1232 (defendant cannot show prejudice “because he was sentenced to the lowest term of imprisonment possible under the guidelines and he is unable to articulate anything that he could have said that could have driven the sentence below the lowest end of the Guideline range.”); Gerrow, 232 F.3d at 834 (district court’s failure to address defendant at sentencing did not amount to manifest injustice where court imposed sentence at the lowest end of the guideline range and defendant could not point to any information he would have conveyed to the district court at sentencing which would have “resulted in a sentence lower than the lowest end of the guideline range”); Rodriguez-Valasquez, 132 F.3d at 700 (defendant did not suffer manifest injustice where he did not object to the sentence amount and was sentenced at the low end of the Guidelines). However, as referenced earlier, *see supra* note 193, the Eleventh Circuit does not always hold to a prejudice analysis. *See* Taylor, 11 F.3d at 152 (applying reversible error approach); Phillips, 936 F.2d at 1256 (same). *See also* Adams, 252 F.3d at 287 (defendant suffers prejudice from lack of allocution if he was sentenced at bottom of guideline range and “there are *any* disputed facts at issue at sentencing, or any arguments raised in connection with

Conversely, the Ninth Circuit has ruled that denial of a defendant's allocution rite is presumed prejudicial if there is any possibility, no matter how remote, that had the defendant been permitted to speak, the court might have granted a lower sentence.²⁰⁰ This standard applies even if the defendant was sentenced at the bottom of the appropriate Guideline range, and regardless of whether what the defendant claims he would have stated during allocution was raised in any manner by himself or his attorney during the sentencing proceedings.²⁰¹ The Ninth Circuit's broad approach almost brings one to a reversible error review for correcting defendant allocution errors which is applied by a minority of courts.²⁰² While still focusing on whether the lack of allocution impacted the defendant's sentence, the Ninth Circuit implies that unless a defendant received the statutory mandatory minimum sentence for his crime, the denial of allocution should always be corrected.

2. Rule 52 plain error

Of course, even if a court determines that a defendant was prejudiced by the denial of his right to allocute, a remedy is not guaranteed if the court is proceeding under a plain error analysis. Under this analysis, a court can exercise its discretion to not correct an error raised in

sentencing, that if resolved in the defendant's favor would have reduced the applicable Guidelines range or the defendant's ultimate sentence").

²⁰⁰ *United States v. Medrano*, 5 F.3d 1214, 1219 (9th Cir. 1993).

²⁰¹ It must be noted that the Ninth Circuit is the most variable of the federal courts in its expression and application of standards of review for defendant allocution errors. As referenced above, in *Mejia*, the court ruled that where a defendant received the lowest sentence possible, he could not claim prejudice from the denial of his right to allocute. *See supra* note 195 and accompanying text. *Mejia* directly contradicts *United States v. Medrano*, 5 F.3d 1214 (9th Cir. 1993), where the court articulated a broad presumed prejudice standard. *See supra* note 198.

²⁰² *See infra* notes 236-42.

an untimely manner by a defendant.²⁰³ As guided by the Court in *Olano*, correction should only occur when (1) the error, (2) is plain, (3) affects the defendant's substantial rights, and (4) "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."²⁰⁴

Just as courts approach the question of prejudice under Rule 52 differently, how courts approach the final prong of a plain error analysis has varied. Some courts have concluded that once they have determined that the error prejudiced the defendant or affected his substantial rights, the error must be corrected because defendant allocution "is the type of important safeguard that helps assure the fairness, and hence legitimacy, of the sentencing process."²⁰⁵ Without allocution, the court denies the defendant the right to serve as his "most persuasive and eloquent advocate,"²⁰⁶ and the court is likewise denied the opportunity to "take into consideration [the defendant's] unique perspective on the circumstances relevant to his sentence, delivered by his own voice."²⁰⁷ Therefore, some courts have little hesitancy in concluding that the denial of allocution is an error of such seriousness to warrant correction.

This approach hints that perhaps there may be something more to defendant allocution than merely mitigating the defendant's sentence. Hearing from the defendant is important, not only because it may impact his sentence, but also because the equity of the proceedings are enhanced by ensuring that a court hears from the defendant prior to issuing the sentence.²⁰⁸

²⁰³ See Adams, 252 F.3d at 284-85.

²⁰⁴ 507 U.S. 725, 736 (1993).

²⁰⁵ Adams, 252 F.3d at 288.

²⁰⁶ *Id.* (quoting *United States v. Green*, 365 U.S. 301, 304 (1961)).

²⁰⁷ *Id.*

²⁰⁸ See e.g., Cole, 27 F.3d 996, 999 (4th Cir. 1994) ("When a defendant was unable to address the court before being sentenced and the possibility remains that an exercise of the right of allocution could have led to a sentence less than that received, we are of the firm opinion that

Echoing something akin to the rite based approach to victim allocution, this view of defendant allocution suggests that there is something inherently important about the practice which should not be denied the defendant. This means of correcting defendant allocution denials under a plain error review, however, has not been universally accepted.²⁰⁹ Some courts are reticent to conclude that the prejudice arising from the denial of the defendant's right is inherently so serious as to implicate the fairness or integrity of the judicial proceedings.²¹⁰ For these courts, there may be circumstances where a careful search of the trial record indicates that despite the allocution error, the integrity of the sentencing proceeding remained in tact.²¹¹ Hence, even if a defendant is prejudiced by the denial of his allocution rights, courts adopting this alternative review for the practice would deny the defendant a remedy.

fairness and integrity of the court proceedings would be brought into serious disrepute were we to allow the sentence to stand.”). *See also* *United States v. Prouty*, 303 F.2d 1249, 1253 (11th Cir. 2002) (denial of right impacts fairness, integrity, and public reputation of judicial proceedings).

²⁰⁹ *See* *United States v. Reyna*, 358 F.3d 344, 351 (5th Cir. 2004) (“We decline to adopt a blanket rule that once prejudice is found . . . the error invariably requires correction.”).

²¹⁰ *Id.* at 352

²¹¹ *Id.* at 353. For example, in *United States v. Reyna*, the court declined to correct an allocution denial where the defendant had made several appearances before the court for violations of his supervised release. *Id.* at 352. At his second appearance before the court, the judge clearly informed the defendant of what his sentence would be if he again violated his release terms. *Id.* at 352-53. The defendant had already been given the opportunity to allocute at his original sentencing and again when he was re-sentenced upon his first violation of supervised release. *Id.* When the defendant violated the terms of his supervised release a second time, the judge sentenced the defendant to the terms the court set out at the earlier proceeding and did not grant the defendant his allocution right. *Id.* at 352. Under these circumstances, the appellate court declined to correct the error. *Id.* at 353.

VI. EQUAL RIGHTS FOR EQUAL RITES?

The preceding review reveals the curious reality that in many respects, victim allocation under the CVRA is given broader scope and is more likely to be enforced than the defendant's right to do the same. Hence, one must question whether the invocation of the defendant's right to allocute as a model for victim allocation bears weight.²¹² While allocation may generally involve the ritual of the court hearing from the victim or defendant, the underlying theories for each practice share only scant common ground. Generally, the defendant is permitted to speak because there is a chance his allocution statement could impact his sentence. Conversely, when one references the proffered goals for victim allocation, the focus broadens. Providing courts with information regarding the impact of the defendant's acts is, of course, one goal supporting victim allocation. However, the practice also seeks to advance other purposes which are targeted at benefiting the victim, as well as the defendant, regardless of the final calculation of the defendant's sentence. Providing victims with a chance to regain their dignity by confronting the defendant, as well as morally educating the defendant as to the human costs of his actions, are better furthered when the practice of allocation is justified by emphasizing the rite of speaking and being heard, rather than merely focusing on what impact the victim's statement may have on the defendant's sentence. This incongruity in allocation practice favor of the victim challenges the perception that the scales of justice are out of balance and to the detriment of victims. To the contrary, in the context of sentencing allocation, victims' interests appear to slightly outweigh

²¹² See *Kenna I*, 435 F.3d 1011, 1016 (9th Cir. 2006) (“The CVRA commands that victims should be treated equally with the defendant, defense counsel, and the prosecutor”); *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1347 (D. Utah 2005) (interpreting a victim's sentencing rights under the CVRA to put “crime victims on the same footing” as defendants).

those of defendants. One must therefore question whether, and to what extent, this imbalance should be adjusted.

Victims' rights supporters should advocate that the theories which support and further victim allocution be applied equally to defendant allocution. Invoking a rite based theory for victim and defendant allocution would benefit both victims and defendants without resulting in the zero-sum game often feared by critics of the victims' rights movement.²¹³ While both victims and defendants would still have the opportunity to provide the court with information which could impact the defendant's sentence, embracing allocution because of its ritualistic values would grant both victims and defendants broader opportunities for empowerment and education, as well as enhance the perception that the process in which they participated was fair. Moreover, broadening the scope of defendant allocution would temper the argument that if there is an imbalance between victims and defendants at sentencing which favors the victim, that the solution should be to pull back the victim's right and align it more closely with how defendant allocution is narrowly interpreted and administered.

Such an argument is likely not to sit with favor with victims' rights advocates. Curtailing victim allocution to a realm of relevancy could result in relegating the victim back into the role of merely providing evidence to further the government's case, and thereby undermine the victim's status under the CVRA as an independent participant.²¹⁴ Similarly, a narrower approach to victim allocution would limit when the denial of the right could be corrected. As discussed earlier, under the CVRA, provided a victim has complied with the statute's procedural requirements, a court's denial of the victim's right to be reasonably heard at sentencing must be

²¹³ See *supra* note 35 and accompanying text.

²¹⁴ See *supra* notes 64-70 and accompanying text.

corrected.²¹⁵ However, if the victims' right were treated in the same fashion as how a majority of courts treat defendant allocution, a victim would lose the "indefeasible" right to speak,²¹⁶ and instead possess only the chance to speak as deemed relevant by a court.

Of course, courts could view the correction of victim allocution errors more narrowly, and inquire from a relevancy or prejudice standpoint whether the denial of victim allocution should be corrected.²¹⁷ Such an approach, however, presents problems. While victims may be independent participants in the sentencing process under the CVRA, this position does not make them full parties in the proceeding who hold enforceable interests in the ultimate outcome of the proceedings, whether in terms of a verdict or a specific sentence.²¹⁸ To analyze victim allocution denials in light of relevancy or prejudice is therefore misplaced. Even if a victim was displeased with the defendant's sentence or believed he had relevant information to share with the court which could impact the defendant's sentence, the victim lacks a cognizable and enforceable interest in the sentencing outcome.

A relevancy based review of victim allocution errors also invokes the often inaccurate dichotomy of the innocent and vengeful victim seeking a harsh punishment for the reprehensible defendant.²¹⁹ Contrary to this image, there are circumstances where at sentencing, victims

²¹⁵ See *supra* notes 114-120 and accompanying text.

²¹⁶ *Kenna I*, 435 F.3d 1010, 1016 (9th Cir. 2006).

²¹⁷ Generally, criminal trial errors are reviewed under Federal Rule of Criminal Procedure 52, which inquires as to whether the appealing party, most usually the defendant, was prejudiced by the error. See also *infra* § V.C. regarding the correction of defendant allocution errors under Rule 52.

²¹⁸ See *supra* notes 114-120.

²¹⁹ See *supra* notes 31-35 and accompanying text.

express statements of mercy, forgiveness, or hope for the defendant's rehabilitation.²²⁰ Hence, a victim's statement could indeed be relevant to the defendant's sentence, but could serve to mitigate instead of aggravate the court's calculation of the defendant's punishment. If a victim's statement could serve to either increase or decrease the defendant's sentence, then the failure of a court to hear from the victim would always make a potential difference to the defendant's punishment, and therefore always warrant a remand. A standard of review which requires calculating whether the victim's statement would impact the defendant's sentence therefore lacks efficacy. Instead, a review more aligned to a reversible error standard would appear better suited, if only from an efficiency standpoint.

Finally, a relevancy based justification for victim allocution would undermine the other important goals the practice seeks to advance. Attempting to examine the correction of victim allocution errors by asking whether the victim was prejudiced²²¹ because he was denied the opportunity to restore his dignity or educate the defendant, is fraught with difficulties. How does one calculate the prejudice arising from being denied the opportunity for empowerment or the chance to "look [the] defendant in the eye and let him know the suffering his misconduct as caused"?²²² Again, a review more in line with a reversible error standard appears more adept in addressing these harms, which indeed is the approach the CVRA and courts applying the same have adopted.²²³ To approach victim allocution otherwise would thwart the dignitary, cathartic, and participatory components of the practice, many of which are sometimes deemed just as

²²⁰ Bibas & Bierschbach, *supra* note 63 at 137; Bierschbach, *supra* note 11 at *6; Erez, *supra* note 19 at notes 80-81 and accompanying text; Karmen, *supra* note 63 at 162; Tobolowsky, *supra* note 15 at 84-85.

²²¹ See *supra* notes 120-21.

²²² Kenna I, 435 F.3d 1011, 1016-17 (9th Cir. 2006).

²²³ See *supra* § IV.D.

valuable to victims as the ability to make a calculable, and presumably negative, impact on the defendant's sentence.²²⁴

In order to prevent loss of the ground gained by victims at sentencing under the CVRA, advocates should champion bringing the defendant's allocution right in parity with the victim's right. Like victim allocution, defendant allocution should be advanced not only for its relevancy or mitigating functions, but also for its ability to transform the defendant through the ritualistic nature of the practice. There are sound reasons to look beyond a mitigation or relevancy theory to support defendant allocution. Despite the mitigation theory's predominance in supporting defendant allocution, the approach has its limits.²²⁵ It is not always the case that what a defendant says at sentencing can or will matter to his sentence.²²⁶ For example, when a defendant is faced with a statutory mandatory minimum sentence, anything he says in an attempt

²²⁴ The empirical studies regarding victim perceptions regarding the value or worth of their impact or allocution statements, as well as their participation at sentencing, are mixed. Older studies indicate that victim satisfaction was often predicated by victims' perception that their participation made a difference to the case. *See* Tobolowsky, *supra* note 15 at 89. However, more recent studies indicate otherwise. *See e.g.*, Barnard, *supra* note 58 at 76; O'Hara, *supra* note 30 at 241. Professor Erez notes that victims do not appear as interested in changing sentencing outcomes as in how their individual welfare is increased by being granted the opportunity to participate at sentencing. Erez, *supra* note 19 at notes 39-46 and accompanying text. Victim satisfaction with the criminal justice system is increased all the more where restorative justice practices, such as victim-offender mediation, are integrated into the standard aspects of criminal procedure. *See e.g.*, Bibas & Bierschbach, *supra* note 63 at 116-18, 131-33; Bierschbach, *supra* note 11 at *4; Erik Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker?*, 37 MCGEORGE L. REV. 787, 799-801 (2006).

²²⁵ *See* Thomas, *supra* note 122 at 2655-66.

²²⁶ *Id.* at 2657-59.

to reduce his sentence is futile.²²⁷ Similarly, if obtaining a lower sentence really is the sole purpose of defendant allocution, one must question whether defense counsel could easily, if not more efficiently and effectively, fulfill this goal, thereby extinguishing the need to hear from the defendant altogether.²²⁸ Anything a defendant might say could be deemed cumulative and irrelevant to the arguments already made by his attorney,²²⁹ giving weight to the argument that defendant allocution has become an empty formality.²³⁰

It is difficult, however, to conceive of an American legal system which renders punishment without at least granting the party facing punishment one last opportunity to be heard. Even if a defendant has nothing legally substantial to add to the proceedings, most would agree that giving the defendant a final chance to speak is important. The defendant's voice, with his own "halting eloquence,"²³¹ adds an intangible "something" to the proceedings.²³² And

²²⁷ *Id.* at 2657-58.

²²⁸ *Id.* at 2658. Despite the Supreme Court's faith in a defendant's "halting eloquence," *United States v. Green*, 365 U.S. 301, 304 (1961), an uneducated or unsophisticated defendant's allocution statement may often work against him due to his inability to "speak in the smooth, tutored jargon of professional remorse" often heard from better educated or "savvy" defendants. Natapoff, *supra* note 129 at 1468. *See also* *People v. Robbins*, 755 P.2d 355, 371 (Cal. 1988) (Broussard, J., concurring) (expressing concern that a defendant's allocution statement in a capital case may work to his detriment where he is uneducated or inarticulate), *superseded by statute on other grounds as stated in* *People v. Jennings*, 807 P.2d 1009, 1027 (Cal. 1991).

²²⁹ *See* *Boardman v. Estelle*, 957 F.2d 1523, 1530 (9th Cir. 1992) (where defendant is denied right to allocute, but what defendant would have stated was irrelevant or cumulative in light of statements made by defense counsel, error is harmless); *Ashe v. North Carolina*, 586 F.2d 334, 227 (4th Cir. 1978) (same).

²³⁰ *See supra* note 166.

²³¹ *Green*, 365 U.S. at 304.

indeed, some courts have stated that defendants should have the “broad ranging opportunity”²³³ to speak on “any subject of his choosing prior to the imposition of sentence.”²³⁴ Such an approach implies that the purpose of defendant allocution goes beyond solely serving as the means by which to impact the defendant’s sentence. Rather, in his allocution statement, a defendant has the chance to share information with the court which, which while not directly relevant or capable of mitigating his sentence, might fulfill other important goals such as providing a therapeutic outlet for the defendant,²³⁵ and increasing the equity and fairness of the

²³² See Natapoff, *supra* note 129 at 1465-69, *passim*; Thomas, *supra* note 122 at 2659. See also *Harris v. Maryland*, 509 A.2d 120, 127 (Md. Ct. App. 1986) (“Most modern commentators strongly advocate retention of the right of allocution, recognizing the practice in its present form serves a significant function no other procedural device can completely replace.”).

²³³ *United States v. Myers*, 150 F.3d 459, 462 (5th Cir. 1998).

²³⁴ *United States v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1994). The defendant’s right to allocute, however, is not unlimited. Courts, especially those who adopt a mitigating approach to the practice emphasize that the right is not wholly free from restraint. See *United States v. Mack*, 200 F.3d 653, 658 (9th Cir. 2000) (defendant’s right to allocution is not unlimited); *United States v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997) (same); *United States v. Muniz*, 1 F.3d 1018, 1025 (10th Cir. 1993) (“The right to allocution, however, is not one without limits.”).

²³⁵ *United States v. Jackson*, 700 F.2d 181, 191 (5th Cir. 1983) (“the right of allocution has survived more for its therapeutic effect on the defendant than its practical value on the judge’s determination.”); *In re Shannon B.*, 22 Cal. App. 4th 1235, 1241 (Cal. Ct. App. 1994) (referencing therapeutic effect of allocution); *State v. Chow*, 883 P.2d 663, 672 (Haw. Ct. App. 1994) (same); *People v. Foy*, 333 N.W.2d 596, 597 (Mich. Ct. App. 1983) (referencing therapeutic benefit to defendant); *State v. Carr*, 374 A.2d 1107, 1117 (Conn. 1977) (same); LAFAVE, *supra* note 122 at 1231; PETER W. LOW, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 255 (A.B.A. 1969).

sentencing proceeding.²³⁶ This alternative view of defendant allocution is evident in a minority of courts who evaluate defendant allocution denials under a reversible error standard.

As noted earlier, a majority of courts analyze defendant allocution denials under Rule 52 of the Federal Rules of Criminal Procedure.²³⁷ However, at least four circuits treat defendant allocution denials as reversible errors,²³⁸ basing this standard of review in Supreme Court

²³⁶ See e.g., *United States v. Quintana*, 300 F.3d 1227, 1231 (11th Cir. 2002) (allocution helps increase perceived equity of sentencing process); *United States v. Adams*, 252 F.3d 276, 288 (3d Cir. 2001) (allocution “is the type of important safeguard that helps assure the fairness, and hence legitimacy, of the sentencing process”); *United States v. Dabeit*, 231 F.3d 979, 981 (5th Cir. 2000) (allocution has symbolic importance in maximizing perceived equity of sentencing process); *United States v. Meyers*, 150 F.3d 459, 463 (5th Cir. 1998) (“[T]he practice of allowing a defendant to speak before sentencing . . . has symbolic, in addition to functional, aspects.”); *United States v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1994) (allocution serves to maximize perceived equity of sentencing process); *United States v. Barnes*, 948 F.2d 325, 328 (7th Cir. 1991) (“Aside from its practical role in sentencing, the right has value in terms of maximizing the perceived equity of the process.”); *In re Shannon B.*, 22 Cal. App. 4th at 1241 (referencing goal of furthering perceived equity of sentencing proceedings). In *Chow*, the Hawaii Court of Appeals stated

we regard allocution to be a significant aspect of the fair treatment which should be accorded a defendant in the sentencing process. The American Bar Association states that “the policies behind permitting the defendant to make a statement at sentencing have to do more with maximizing the perceived equity of the process than with detecting misinformation or obtaining a reliable impression of the defendant’s character.” *American Bar Association Standards for Criminal Justice*, Commentary to Standard 18-6.4 at 18-459 (2d ed. 1979). We would disagree with the characterization that allocution is “perceived equity,” however, because we believe the defendant’s opportunity to speak on his disposition is, as a matter of fact, essential to fair treatment.

833 P.2d at 672. See also *Thomas*, *supra* note 122 at 2644, 2666-67.

²³⁷ See *supra* § V.C.

²³⁸ See *United States v. Archer*, 70 F.3d 1149, 1151 (10th Cir. 1995) (“The right to allocution is an integral part of the sentencing process which if not fully afforded to the defendant requires a

precedent. In *United States v. Hill*,²³⁹ the Supreme Court cited to *Van Hook v. United States*,²⁴⁰ a decision the Court issued just a month after the *Green* ruling, in referencing the way allocution errors should be reviewed and corrected. *Van Hook* was a one sentence opinion which remanded a case for re-sentencing in light of a trial court's failure to properly comply with Rule 32.²⁴¹ *Van Hook* and *Hill* guide that when a defendant is denied the right to allocute, the proper remedy is to remand the case for re-sentencing. Following suit, the lower courts began treating allocution denials as reversible error.²⁴² However, and as referenced earlier in this piece, a number of

reversal of the sentence imposed.”); *United States v. Axelrod*, 48 F.3d 72, 72-73 (2d Cir.), *cert. denied* 115 S.Ct. 1715 (April 17, 1995) (“Resentencing is required if a district court fails to afford a defendant the opportunity to address the court prior to imposing the sentence.”); *United States v. De Alba Pagan*, 33 F.3d 125, 129-30 (1st Cir. 1994) (“It is settled that a failure to comply with the mandate of Rule 32(a)(1)(C) ordinarily requires vacation of the sentence imposed without a concomitant inquiry into prejudice.”); *United States v. Barnes*, 948 F.2d 325, 332 (7th Cir. 1991) (where defendant was denied right to allocution, sentence must be vacated and case remanded for re-sentencing).

²³⁹ 368 U.S. 424 (1962).

²⁴⁰ 365 U.S. 609 (1961).

²⁴¹ *Van Hook*, 365 U.S. at 609.

²⁴² *See e.g.*, *United States v. Myers*, 150 F.3d 459, 463 (5th Cir. 1998) (“The right of allocution, then, is one deeply embedded in our jurisprudence; both its longevity and its symbolic role in the sentencing process counsel against harmless error analysis in the event of its denial.” (internal citations omitted)), *abrogated by* *United States v. Reyna*, 358 F.3d 344 (5th Cir. 2004); *United States v. Phillips*, 936 F.2d 1252, 1256 (11th Cir. 1991) (court's failure to personally address defendant in accordance with Rule 32 required remand for re-sentencing); *United States v. Walker*, 896 F.2d 295, 301 (8th Cir. 1990) (“It is now well settled that failure to comply with Rule 32(a)'s requirement requires a remand for resentencing.”); *United States v. Serhant*, 740 F.2d 548, 554 (7th Cir. 1984) (“This right of allocution is viewed as so important that reversal of a sentence has been ordered where the defendant did not have a prior opportunity to speak.”);

courts have shifted to a Rule 52 analysis for allocution denials.²⁴³ Nonetheless, a minority of courts still hold to the sentencing approach indicated by the Court in *Hill* and *Van Hook*.²⁴⁴

The overriding theme drawn from the cases taking a reversible error approach to defendant allocution is that the defendant's right to allocute is important not only because it provides the defendant with an opportunity to impact, and presumably lower, his sentence. Of course, these courts do not discount the influence allocution may have on a defendant's sentence. However, because almost all sentencing decisions require courts to exercise some degree of discretion in their sentencing determinations,²⁴⁵ it is difficult to determine the extent to which a defendant's allocution statement might have altered his sentence had he been permitted to speak.

United States v. Murphy, 530 F.2d 1, 2 (4th Cir. 1976) (“Because of the district judge’s failure to accord the appellant the right of allocution, we reverse and remand for resentencing before a different district judge.”); United States v. Gardner, 480 F.2d 929, 932 (10th Cir. 1973) (where defendant denied right of allocution, remand for re-sentencing was required) *superseded by statute on other grounds as stated in* Smith v. United States, 551 F.2d 1193, 1196 (10th Cir. 1977); *Cuozzo v. United States*, 325 F.2d 274, 276 (5th Cir. 1963) (“The record convinces us that appellants were not afforded this valuable right of allocution and for that reason their sentence must be vacated and the case remanded to the District Court for corrective action prior to resentencing.”); United States v. Allegrucci, 299 F.2d 881, 815 (3d Cir. 1962) (failure to grant allocution right required resentencing); United States v. Byars, 290 F.2d 515, 516-17 (6th Cir. 1961) (court’s failure to afford defendant opportunity to make statement prior to sentencing required remand for re-sentencing).

²⁴³ See *infra* § V.C.

²⁴⁴ See *supra* note 236.

²⁴⁵ A sentencing court’s discretion has been all the more increased since the Supreme Court’s decision in *Booker*. See *supra* note 196 referencing the impact *Booker* has had on federal sentencing practice.

The reversible error approach eliminates this guesswork. Denial of the right is presumed to always matter, and hence should always be corrected.

Beyond making a calculable difference to a defendant's sentence, courts employing a reversible error approach also signal that defendant allocution should be enforced because of the inherent importance of the rite of allocution. Harkening back to the common law concerns underlying defendant allocution,²⁴⁶ courts who adopt a reversible error approach to allocution underscore that there is something discordant in allowing a judge to pronounce a sentence without hearing from the party being sentenced. These courts enforce the rite, and right, of allocution not only for the tangible impact it may have on a defendant's sentence, but also for its broader values and purposes.

It is here where the humanization model for defendant allocution as proffered by Professor Kimberly Thomas in her work *Beyond Mitigation: Towards a Theory of Allocution* is particularly apt.²⁴⁷ As the title of her model suggests, Professor Thomas argues defendant allocution should not be limited to its mitigating role, but should also serve as a means to humanize the defendant.²⁴⁸ This humanizing function is furthered by the specific facts a defendant may share with a court in his allocution statement, and also through the defendant's very act of speaking. The Supreme Court emphasized this idea in *Green*, where it stated that "the most persuasive counsel may not be able to speak for a defendant, as the defendant might,

²⁴⁶ See *supra* notes 40-43 and accompanying text.

²⁴⁷ See *supra* note 122 at 2645-47, 2666-69.

²⁴⁸ Professor Thomas contends allocution should serve as a means by which the court can obtain a broader picture of the defendant and thereby ensure that the punishment not only fits the crime, but also fits the defendant. *Id.* at 2644 & n.20.

with halting eloquence, speak for himself.”²⁴⁹ A humanizing approach to allocution also emphasizes the important ritualistic functions of the rite. Here, one can draw parallels from the goals of victim allocution – empowering the victim, educating the defendant, and providing information for the court – and apply them equally to defendant allocution. Of course, the latter goal is fully embodied in the prevailing approach to defendant allocution. However, reviewing defendant allocution under a rite based approach also allows for the transformation and empowerment of the defendant, as well as education for the victim.

On a practical level, and whether he likes it or not, by being a central player in the ritual of trial and sentencing, the defendant will be transformed from being “the accused,” to either “the convicted” or “the exonerated.” Apart from this legally imposed transformation, the defendant’s participation in the ritual of sentencing may bring about more nuanced but equally important changes in the defendant. Through the rite of allocution, the defendant is afforded a sense of dignity because he is directly acknowledged by the sentencing body. The defendant is no longer passively silent, but becomes an active “participant in the public institution of criminal justice that directly affects his life.”²⁵⁰ Certainly, defendants possess the right to testify on their own behalf during other parts of the trial. However, their statements are likely to be carefully cabined and directed by defense counsel. Moreover, any number of institutional incentives

²⁴⁹ *Green*, 365 U.S. 301, 304 (1961).

²⁵⁰ *See Thomas, supra* note 122 at 2673. *See also Harris v. Maryland*, 509 A.2d 120, 127 (Md. 1986) (“the allocutory process provides a unique opportunity for the defendant himself to face the sentencing body, without subjecting himself to cross-examination, and to explain in his own words the circumstances of the crime and his feelings regarding his conduct, culpability, and sentencing.”).

temper against a defendant speaking upon his own behalf.²⁵¹ Likewise, an overwhelming majority of defendants enter guilty pleas. While entering a guilty plea makes it more likely the defendant will receive a lower sentence, doing so also strips the defendant of his opportunity to testify on his own behalf at trial.²⁵² Finally, even if a defendant proceeds to trial and chooses to speak on his own behalf, he subjects himself to credibility challenges.²⁵³ Hence, only a minority of those defendants who proceed to trial chose to testify.²⁵⁴

The silence of defendants, whether at trial or at sentencing, may be detrimental to both the defendant and the criminal process.

[I]t is through speech that defendants enter into a relationship with the law. Through speech they attain and express their understanding or misunderstanding of legal dictates, their views on the fairness or unfairness of the procedures by which they are adjudicated, and, ultimately, their acceptance or rejection of the process and its outcome. Defendants who remain silent throughout the legal process are less likely to understand their own cases, engage the dictates of the law intellectually, accept the legitimacy of the outcomes, feel remorse, or change as a result of the experience.²⁵⁵

The rite of allocution, therefore, gives the defendant an opportunity to define himself, his relationship with the law, and his place in the world separate and distinct from how he has been defined by the state and defense counsel.²⁵⁶ He can choose to express remorse and apology; fervently assert his innocence; or challenge the very system before which he is standing.

²⁵¹ For example, in *Miranda v. Arizona*, the Supreme Court ruled that a defendant has the right to remain silent upon arrest. 380 U.S. 436 (1966).

²⁵² See Natapoff, *supra* note 129 at 1462.

²⁵³ *Id.* at 1460.

²⁵⁴ *Id.* at 1450, n.2-3 (noting that over ninety-five percent of cases are resolved through plea bargains, and of those defendants who proceed to trial, only half testify).

²⁵⁵ *Id.* at 1450-51.

²⁵⁶ See Thomas, *supra* note 122 at 2673-74 & n.176.

Being acknowledged by the court, and having the opportunity to “have his say” may also therapeutically benefit the defendant, a value espoused by courts and commentators.²⁵⁷ Whether the defendant experiences catharsis through the act of apology,²⁵⁸ or empowerment through statements of innocence or defiance, the defendant is honored and dignified by being granted the opportunity to speak. As one state court commented:

Standing convicted of a crime, the defendant should be accorded the right to speak regardless of whether it will actually affect the sentence ultimately imposed. While any statement the defendant may make might be “meaningless” in terms of the sentence to be received, we cannot say that the individual defendant would regard his or her remarks as meaningless.²⁵⁹

Likewise, a defendant’s continued protests of innocence,²⁶⁰ or statements of challenge against the legal system, serve as important outlets for defendant self expression which may provide broader context to the criminal justice process. The defendant statements of defiance in *United States v. Mitchell*,²⁶¹ *United States v. Kellog*,²⁶² and *United States v. Burgos-Andjuar*,²⁶³ find fuller meaning here. In each of those cases, the defendants’ statements served to their

²⁵⁷ See *supra* note 233 and accompanying text.

²⁵⁸ See e.g., Bibas & Bierschbach, *supra* note 63 at 90 (arguing that “apology . . . is a powerful ritual for offenders, victims, and communities, one that criminal procedure could facilitate by encouraging offenders to interact face to face with their victims”). See also *id.* at 141-45 (discussing the role of defendant apology at sentencing).

²⁵⁹ *People v. Smith*, 292 N.W.2d 206, 207 (Mich. Ct. App. 1980).

²⁶⁰ Thomas, *supra* note 122 at 2666-67. As noted by Professor Thomas, there may be some instances where the defendant’s protestations of innocence are in fact true. Allocution, therefore, serves as one of the last chances for a defendant, aside from post-conviction or appeal proceedings, to challenge or question an improper conviction. *Id.* at 2662.

²⁶¹ 392 F.2d 214 (2d Cir. 1968) (draft dodger).

²⁶² 955 F.2d 1244 (9th Cir. 1992) (tax protester).

²⁶³ 275 F.3d 23 (1st Cir. 2001) (military protester). See also *supra* notes 168-76 discussing *Mitchell*, *Kellog*, and *Burgos-Andjuar*.

detriment at sentencing. Nonetheless, there may be value in providing defendants a forum in which they are able to personally challenge the legal system.²⁶⁴ In advocating for increased defendant speech in all phases of the criminal justice process, Professor Alexandra Natapoff posits that when courts do not hear from defendants, the effectiveness of the criminal justice system is undermined.

[D]efendants are experts in the system, with unique experiences that could cast light on the central efficiencies and inefficiencies of the criminal process, as well as its various claims to fairness. Indeed, defendants are the subjects of the system itself: Laws and punishments are aimed centrally at their minds and behaviors. If defendants are ignorant of the law and their obligations, it may mean that the system does not convey its message well. If defendants experience the legal process as unfair, overbearing, and unresponsive, it suggests that some of the promises of due process and the Bill of Rights have gone unfulfilled. If defendants feel guilty and remorseful about their criminal behavior, perhaps the criminal law reflects generally shared norms and values. Without hearing from defendants in their own voices, however, it's hard to say whether any of these things are true. For these reasons, a marketplace of ideas [of the criminal justice system] that does not include defendant voices is an impoverished one whose outcomes and conclusions are suspect.²⁶⁵

She further contends that “defendant silence . . . maintains the ignorance of institutional players such as judges and prosecutors who never hear the full story about the individuals before them, or indeed about the functioning of the justice system itself.”²⁶⁶ In this regard, defendant statements of defiance may legitimately highlight system-wide injustices and serve to further necessary legal change.²⁶⁷

²⁶⁴ See Natapoff, *supra* note 129 at 1487-88, 1498-1502.

²⁶⁵ *Id.* at 1488.

²⁶⁶ *Id.* at 1499. See also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988) (discussing the important role narrative plays in the law by not only building shared understandings about the world, but also by challenging one's perceptions regarding societal structures).

²⁶⁷ In furthering this argument, Professor Thomas references Nelson Mandela's statements prior to being sentenced to life imprisonment. His comments did not include apology or remorse, but

Broadening the theory and practice of defendant allocution could also bring added benefits to victims. Victims are often plagued with the question of “why” in relation to the crime committed against them or a loved one. When a defendant feels permitted to explain his actions, even if such an explanation does not contain statements of remorse or apology, some of the victim’s questions regarding the crime may be answered, while potentially furthering the victim’s healing process. Moreover, a sentencing procedure which allows for broader expressions from both victims and defendants provides a forum in which the moral and relational balance disrupted by the defendant’s criminal acts against the victim can be righted.²⁶⁸ Of course, there is no guarantee that a broader approach to a defendant’s allocution speech will always result in an opportunity for healing for the victim or for the defendant. However, a rite based or humanization approach to defendant allocution is more likely to produce an environment conducive to such restorative speech, than an approach which focuses solely on information which may reduce the defendant’s sentence.

An additional benefit which may be drawn from viewing defendant allocution beyond merely impacting his sentence, is that a system which ensures that all relevant parties have been afforded an opportunity to be heard, is perceived to be more equitable, legitimate, and just.²⁶⁹ Victims’ rights advocates have effectively capitalized on the fairness and equity argument in advancing the victims’ right to be heard at sentencing. How could a proceeding be fair when the

instead called for “an alternative vision of justice in the face of what he believed to be an unjust system.” Thomas, *supra* note 122 at 2665-66. While admittedly an extreme example, Nelson Mandela’s allocution speech nonetheless highlights that there may be settings where a defendant’s non-mitigating speech may have incalculable value. *Id.* The system Mandela challenged and defied has now changed.

²⁶⁸ See *supra* notes 91-95 accompanying text.

²⁶⁹ See *supra* note 234 and accompanying text.

party directly impacted by the crime is silenced? The same argument should apply with equal force to the defendant. The individual who will be directly impacted by the court's decision should be permitted to address the court, thereby furthering the perception that the institution rendering the sentence is fair and equitable. A public sentencing at which the defendant is given the right to speak allows the state "to assure the appearance of justice and to provide a ceremonial ritual at which society pronounces its judgment."²⁷⁰ The symbolic rite of allocution therefore not only benefits the defendant, but also the court, state, and the public.²⁷¹

²⁷⁰ *United States v. Curtis*, 523 F.2d 1134, 1135 (D.C. App. 1975). In discussing this concept in conjunction with the issue of open and public trials, the Supreme Court has commented that

[t]he crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner [or] in any covert manner. . . . To work effectively, it is important that society's criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.

. . . .
People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

. . . .
It is not unrealistic . . . to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571-573 (1980) (internal quotations and citations omitted).

²⁷¹ *See e.g.*, *Adams*, 252 F.3d at 288 (allocution "is the type of important safeguard that helps assure the fairness, and hence legitimacy, of the sentencing process"); *Meyers*, 150 F.3d at 463 ("[T]he practice of allowing a defendant to speak before sentencing . . . has symbolic, in addition to functional, aspects."); *United States v. Cole*, 27 F.3d 996, 999 (4th Cir. 1994) ("When a defendant was unable to address the court before being sentenced and the possibility remains that an exercise of the right of allocution could have led to a sentence less than that received, we are of the firm opinion that fairness and integrity of the court proceedings would be brought into serious disrepute were we to allow the sentence to stand."); *Barnes*, 948 F.2d at 328 ("Aside from its practical role in sentencing, the right has value in terms of maximizing the perceived

Finally, one should not forget that a criminal trial is ultimately about the defendant. Certainly, the victim bears a deep and personal interest in the proceeding. It was the victim who was robbed, assaulted, or who lost a loved one at the hands of the defendant. However, it is the defendant who is subject to the power of the state, and may be deprived of his liberty, and perhaps even his life, at the end of the criminal proceeding. When contemplating what may be just and fair, a sentencing proceeding which provides the defendant with a full opportunity for self expression should be advanced.

V. CONCLUSION

Debates surrounding the victims' rights movement can no longer be framed in terms of "should victims possess an independent role in the criminal justice system?" Advocates have already successfully begun to carve out an independent role for victims in the administration of criminal justice. Hence, the more appropriate question is "how do we define the victim's role?"²⁷² In addressing this question however, one should always ask what balance, if any, should exist between the role and rights of victims, and the role and rights of defendants.

equity of the process."). *See also* United States v. Degenhardt, 405 F. Supp. 2d 1341, 1349 (D. Utah 2005) ("Part of the rite [of allocution] is a chance for the participants – the defendant, the prosecution, and now the victim – to have their say before sentence is imposed. That process is short circuited if one of the participants – the victim – is denied an opportunity to speak."); United States v. Marcello, 370 F. Supp. 2d 745, 746 n.2 (N.D. Ill. 2005) ("the victim, in a moral sense, [is] a party to the case and . . . should always be given the opportunity to testify at all sentencing hearings"). *See also supra* note 94-95, 222, and accompanying text regarding victim satisfaction with the criminal process where they have been the opportunity to participate in the sentencing proceeding.

²⁷² *See e.g.*, Beloof, *The Third Model*, *supra* note 19 at 289; O'Hara, *supra* note 30 at 233-34, 241-42; Tobolowsky, *supra* note 15 at 103.

The defendant's sentencing right of allocution provides a useful benchmark from which to begin to address the victim's role at sentencing under the CVRA. However, as this paper has highlighted, in federal sentencing practice an imbalance exists in favor of the victim. Victim allocution is driven largely by the ritualistic, cathartic, and participatory goals it serves, while defendant allocution is grounded in its mitigating functions. The result is that a victim's right to allocute is more likely to be enforced, as well as provide victims with a wider opportunity for self-expression at sentencing, than how defendants can exercise and enforce their right.

In the quest to render more equitable and balanced treatment between victims and defendants in the criminal justice system, victims' rights advocates should not be content to accept this current disequilibrium. Allocution, whether practiced by victims or defendants, should not exist merely because of its calculable ability to alter, in one way or the other, a sentence. Rather, it should serve to instill within all present and participating at the proceeding that the speaker's views regarding the matter before the court are valuable. Through the simple act of speaking and being heard, the speaker, and his or her experiences, are honored. When both victims and defendants can engage in a sentencing rite which dignifies the speaker, allows for catharsis, and enhances the legitimacy of the sentencing process, we may edge closer to a concept of fairness that is not strained to a filament, but which is indeed true.²⁷³

²⁷³ *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).