

2007

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Recommended Citation

Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 Fordham L. Rev. 2641 (2007).
Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss5/16>

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Cover Page Footnote

Clinical Assistant Professor, University of Michigan Law School. For helpful comments on earlier drafts, I would like to thank Eve Brensike, Bridget McCormack, Jonathan Sacks, Vivek Sankaran, David Santacroce, Jason Solomon, Frank Vandervort, and James Boyd White, as well as participants in the Clinical Law Review writer's workshop, especially Adele Bernhard, Lily Camet, Randy Hertz, and Mae C. Quinn. Additional thanks to Paul Hunt, Matt Morris, and the editors of the Fordham Law Review, especially Charles Keeley, for their able assistance and attention to detail.

BEYOND MITIGATION: TOWARDS A THEORY OF ALLOCUTION

*Kimberly A. Thomas**

THE COURT: I don't think I have time to listen I am not going to reexamine your guilt or innocence here. That is not the purpose of a sentence.

THE DEFENDANT: I did not have the chance to tell you

. . . .

THE DEFENDANT: But, your Honor, listen to me—!

Should the court hear this defendant? Is the story of innocence relevant at allocution—the defendant's opportunity to speak on his or her own behalf at the sentencing hearing prior to the imposition of sentence? Or, is the purpose of allocution something different, as the judge suggests? The answers depend on articulating a coherent account of the historic practice of allocution and its place within the modern criminal system, a task I take up in this Article.

INTRODUCTION: WHY ALLOCUTION?

In law, especially criminal law, trials are held up as the main event—the stage on which the legal drama plays itself out. In this imagined scenario, two accounts of the alleged criminal offense are offered to the jury through opening statements, testimony, and closing arguments by competent counsel for each side. The fact-finder chooses the story that it finds to be true, a verdict is rendered, and justice is done. Even if this ideal was ever accurate,² in the modern justice system, it is pure myth.

* Clinical Assistant Professor, University of Michigan Law School. For helpful comments on earlier drafts, I would like to thank Eve Brensike, Bridget McCormack, Jonathan Sacks, Vivek Sankaran, David Santacroce, Jason Solomon, Frank Vandervort, and James Boyd White, as well as participants in the Clinical Law Review writer's workshop, especially Adele Bernhard, Lily Camet, Randy Hertz, and Mae C. Quinn. Additional thanks to Paul Hunt, Matt Morris, and the editors of the *Fordham Law Review*, especially Charles Keeley, for their able assistance and attention to detail.

1. *United States v. Li*, 115 F.3d 125, 131 (2d Cir. 1997). The case name *Li* refers to defendant Lu's daughter, who was also charged. *See id.* at 128.

2. George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 1 (2003) (noting that, as early as the 1920s, commentators bemoaned the "vanishing jury"); *see also* Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics* 423 tbl.5.22 (2003) (showing the number and type of dispositions in U.S. district courts from 1945 to 2003).

Most criminal defendants never go to trial.³ The overwhelming majority of cases end in guilty pleas.⁴ This is true in state and federal courts, for misdemeanors and felonies.⁵ Of the cases that go to trial, at least a small percentage are either stipulated or other perfunctory bench trials.⁶

Even in contested trials, the defendant takes the stand in his own defense in only a fraction of cases.⁷ The defendant can choose whether or not to testify.⁸ He has the right to testify even against the advice of counsel.⁹ He¹⁰ is told, however, that his silence cannot be held against him.¹¹ As a

3. See Bureau of Justice Statistics, *supra* note 2, at 457 tbl.5.57 (stating that of the felony arrests in the seventy-five largest counties in the country, 3% of those convicted went to trial; less than 0.5% of misdemeanor defendants arrested in these counties were convicted at trial; and, of all arrests, only 1% were acquitted at trial).

4. See, e.g., *id.* (stating that of the felony arrests in the seventy-five largest counties in the country, 3% of those convicted went to trial); *id.* (stating that less than 0.5% of misdemeanor defendants arrested in these counties were convicted at trial); *id.* at 423 tbl.5.22 (showing that in 2003, of the 83,530 defendants in U.S. district court, 72,110 plead guilty or nolo contendere, while only 3463 were either convicted or acquitted after trial).

5. See *id.* at 426-27 tbl.5.24 (showing the disposition of cases in U.S. district court by offense).

6. See Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 Colum. L. Rev. 959, 979 n.76 (2005) (quoting a defense attorney who conducted stipulated trials to preserve issues litigated in a motion to suppress); Maurita Elaine Horn, Comment, *Confessional Stipulations: Protecting Waiver of Constitutional Rights*, 61 U. Chi. L. Rev. 225, 239-40 (1994) (discussing some reasons defendants might use stipulated trials).

7. See Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 Val. U. L. Rev. 311, 329-30 (1991) (describing one study in Philadelphia in the 1980s that found that 49% of felony defendants and 57% of misdemeanor defendants chose not to testify); see also Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1450 & n.3 (2005) (citing the Philadelphia study for the proposition that only half of those defendants who go to trial testify).

8. See Model Rules of Prof'l Conduct R. 1.2(a) (2004) (requiring that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, . . . whether the client will testify").

9. *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring); *United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984) (stating that the decision to testify is a constitutional right, not a trial strategy decision that can be waived by counsel).

10. Throughout this Article, when describing a defendant, I use male pronouns and adjectives. While there are a significant number of female defendants in the criminal justice system, I assume a male defendant for convenience and in recognition that the majority of criminal defendants are men.

11. See, e.g., *Griffin v. California*, 380 U.S. 609 (1965). Juries are instructed that they cannot hold the defendant's silence against him. See, e.g., 7th Cir. Fed. Crim. Jury Instr. 3.01 (West 1999) ("The [A] defendant has an absolute right not to testify. The fact that the [a] defendant did not testify should not be considered by you in any way in arriving at your verdict." (alterations in original)); Charges to Jury and Requests to Charge in a Criminal Case in N.Y. § 4:74 (Howard G. Levanthal ed., 1988) ("As you may recall, the defendant did not testify on his own behalf. I charge you that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn."). To be sure, some jurors, despite the constitutional basis and instruction, expect to hear the defendant's testimony and hold it against a defendant who fails to testify. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1527 (1999) ("The jury is apt to infer guilt from the defendant's failing to testify (and this, once again, regardless of any limiting instructions).").

matter of practice, many defense attorneys discourage their client from testifying—particularly if he has a prior criminal record or his version of events is, in the eyes of the attorney, implausible.¹² Finally, constraints on the relevance of testimony might limit the defendant's ability to recount the events as he sees them.¹³ In the end, only a small percentage of persons convicted of crimes will tell a judge or jury their story during a trial.¹⁴ Most—however remorseful, justified, or angry—will not have a chance to speak until the sentencing hearing.¹⁵

The silencing of defendants serves to disproportionately quiet the voices of the poor and people of color within the court system. The obstacles preventing poor and minority litigants from "having their say" in court have been thoroughly recognized.¹⁶ The specific silencing of defendants within the criminal system is one of the starkest examples of this reality.¹⁷

Allocution matters because it is one place in the criminal process where every convicted defendant has the chance to speak.

In this Article, I develop two, sometimes competing, theories of the practice of allocution: mitigation and humanization.¹⁸ Mitigation is

12. See, e.g., Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966) (discussing the course of action if defense counsel cannot dissuade a possibly perjurious client from testifying). See generally *Nix v. Whiteside*, 475 U.S. 157 (1986); Model Rules of Prof'l Conduct R. 3.3(a)(3) (2004) ("A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.").

13. See generally Fed. R. Evid. 402. Furthermore, the definition of an offense or defense will limit the scope of relevant evidence. For example, a defendant might be limited in testifying to (or discouraged by counsel from testifying to) precipitating events if these events do not constitute an actual defense or if they merely explain the defendant's motive in carrying out an offense. The defendant might state, for example, that he did not know what he was doing when he burglarized a home because he was so high on PCP that he does not remember anything.

14. See, e.g., *United States v. Li*, 115 F.3d 125, 131-32 (2d Cir. 1997) (reprinting an exchange between a defendant and the court at allocution).

15. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L.J. 1097, 1152 (2001); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 Stan. L. Rev. 1447, 1455 (1997) ("Until the sentencing phase—days, weeks, or even months into the process—most capital defendants sit mute in the courtroom, each one a kind of criminological Rorschach card onto which jurors may project their deepest fears and anger.").

16. See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra L. Rev. 533 (1992); see also Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. Rev. L. & Soc. Change 659, 692 (1988) (noting the silencing of poor clients in the attorney-client relationship).

17. See Natapoff, *supra* note 7, at 1450.

18. I use the term "humanization" both to incorporate the more widely used term individualization and to convey meaning beyond individualization. The term is not meant to suggest that defendants lack humanity. See, e.g., James M. Doyle, *The Lawyer's Art: "Representation" in Capital Cases*, 8 Yale J.L. & Human. 417, 426 (1996) (using the term "humanize" not as "the Orwellian insult to the defendants that it appears to be," but instead to counter representations of the defendant that dehumanize him or convert his entire person into the act of the offense); Haney, *supra* note 15, at 1451 (discussing dehumanization of the

allocution's most obvious purpose. Simply put, the defendant has a chance to say something to the judge that will lessen the sentence. A defendant might admit his responsibility for an offense or give details about his involvement that lessen his role.

Information that is considered mitigating varies from court to court and from sentencing system to sentencing system. However, the facts contemplated by sentencing guidelines and statutes show some agreement about the type of information that is believed (at least by legislators) to be mitigating. For example, a defendant's acceptance of his responsibility for the offense¹⁹ has repeatedly been recognized as a mitigating fact that could be conveyed at allocution.

While an important thread in allocution theory, mitigation is not the only possible rationale. Another persistent rationale for allocution—and for sentencing hearings in general—is individualization or humanization of the defendant. Each sentence given should be tailored to fit the defendant and the offense.²⁰ The sentencing hearing, and the defendant's allocution in particular, is an opportunity for the court to learn details about the person to be sentenced. The court uses these nuances to impose a just sentence that is appropriate to the particular defendant. At its most pronounced, humanization has little in common with the traditional mitigation rationale.

Despite the unique role of allocution at criminal sentencing and the practice's existence for over 300 years,²¹ few scholars have systematically studied the practice or examined the theoretical underpinnings of the right.²² Courts also give short shrift to any inquiry into allocution's function, even in cases in which distilling the underlying purpose of the practice would guide the court's decision. Now, when sentencing law is under increased scrutiny,²³ we need to refocus attention on the purposes underlying our sentencing practices.

In this Article, I begin to fill this gap by examining the practice of allocution. In Part I, I examine the historical practice of allocution, contemporary case law, and sentencing practice to inform the choice of

defendant as one way in which capital juries experience "moral disengagement" from the significant decision to put someone to death).

19. See U.S. Sentencing Guidelines Manual § 3E1.1 (2006) (allowing a decreased sentence for "acceptance of responsibility").

20. See *Williams v. New York*, 337 U.S. 241, 247 (1949) (describing a "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime"). The extent to which judges can or should be allowed to promote this goal, especially when compared to achieving parity between people convicted of the same statutory offense, is limited by the legislature's use of mandatory minimums, "three strikes" laws, and mandatory sentencing guidelines.

21. *Green v. United States*, 365 U.S. 301, 304 (1961) (stating that "[a]s early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal").

22. Paul W. Barrett, *Allocution*, 9 Mo. L. Rev. 115 (1944), which is often cited when allocution is considered, is the main exception.

23. In particular, scrutiny increased following the U.S. Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004). See *infra* Part I.C.

allocution purposes. None of these clearly supplies a rationale for allocution; instead, they could justify mitigation as easily as humanization. In Part II, I examine the case for mitigation. While support for a mitigation theory can be gleaned from common law and current case law, I ultimately conclude that viewing mitigation as the purpose of allocution fails to take into account the real experiences of defendants, who sometimes want to convey alternative stories of mercy, innocence, and defiance. In Part III, I explore the initial contours of a humanization theory of allocution and discuss some possible benefits of this theory to the defendant. Specifically, I argue that a humanization theory allows for a broader range of defendant speech—potentially combating the loss of offender’s voice in the criminal justice system. Also, a humanization rationale could benefit the criminal justice system and the public by improving the legitimacy and accuracy of the sentencing process. In Part IV, I address some criticisms of a humanization model—that it is inefficient and that it allows for increased discrimination at sentencing. I also examine a few practical ramifications. If a humanization theory of allocution was emphasized, two consequences would result: One, defense attorneys would have an increased counseling role at the sentencing stage, and two, harmless error review of the denial of allocution would be inappropriate.

I. WHAT IS ALLOCUTION? THE PAST AND PRESENT OF ALLOCUTION PRACTICE AND THE CONTEXT OF MODERN SENTENCING

A. *Historical Development of Allocution*

The history of allocution does not clearly signal which direction the modern practice should take, but it does give insight into the origins and purposes of allocution.

1. Common Law Allocution

At common law, allocution was a right given largely to persons convicted of capital felonies.²⁴ These defendants were neither entitled to counsel nor able to testify on their own behalf at trial.²⁵ At sentencing, the defendant was asked, “Do you know of any reason why judgment should not be pronounced upon you?”²⁶

24. See Barrett, *supra* note 22, at 117-19, 126-40 (discussing the offenses for which allocution was granted in England and in the 1800s in the United States). In general, allocution was given following capital felony trials, while some jurisdictions extended allocution to other situations. See *id.*

25. See Green, 365 U.S. at 304. But see Barrett, *supra* note 22, at 122-23 (describing *Rex v. Royce*, (1767) 98 Eng. Rep. 81 (K.B.), an early English allocution case, in which the defendant appears to be represented).

26. Barrett, *supra* note 22, at 115; see also 1 J. Chitty, *A Practical Treatise on the Criminal Law* 700 (2d ed. 1816) (stating that the defendant should be asked by the clerk, and that the question was “indispensably necessary”).

The defendant could respond with a limited number of reasons:²⁷ He or she could raise pardon,²⁸ pregnancy,²⁹ insanity,³⁰ misidentification,³¹ or benefit of the clergy.³² According to English commentators, the effect of a successful allocution was that the entire proceeding would be "set aside."³³ Benefit of the clergy originated in the exemption of clergypersons from the jurisdiction of the secular, criminal court under limited circumstances.³⁴ However, the practice was gradually extended to more people, including laymen, especially those with status or education.³⁵ The right of allocution, though not in the exact details established in England, was incorporated into American criminal practice.³⁶ Instead of setting aside the entire case, for example, most early American cases that reversed for a denial of allocution merely ordered resentencing.³⁷

Early English and American scholars described the practice, but gave little insight into why allocution was thought to be important.³⁸ From the

27. See Barrett, *supra* note 22, at 120 (stating that because of the severity of punishment, and additional punishment sometimes meted out to a defendant's property or a defendant's family, "[o]f necessity some palliatives to these severe judgments and their consequences had to develop or be invented").

28. 4 William Blackstone, *Commentaries on the Laws of England* 1035, 1042-43 (3d ed. 1890); 1 Chitty, *supra* note 26, at 700; Barrett, *supra* note 22, at 117; see also 3 James Fitzjames Stephen, *A History of the Criminal Law of England* 38-41 (London, MacMillan 1883) (suggesting that pardons were sometimes available, sometimes for a fee, to those who killed accidentally or in self-defense).

29. 4 Blackstone, *supra* note 28, at 1041-42; Barrett, *supra* note 22, at 121. The reprieve for pregnancy only extended until the child was born and may have been limited to the first pregnancy only. *Id.* at 121 n.28.

30. Barrett, *supra* note 22, at 121 & n.29 (citing 1 Chitty, *supra* note 26, at 761).

31. *Id.* at 120, 121 & n.27 (citing 1 Chitty, *supra* note 26, at 698). Misidentification meant that the person present before the court for sentencing was not the same person who was convicted of the offense. See *id.* at 120.

32. *Id.* at 117; see also 4 Blackstone, *supra* note 28, at 1030-34; 1 Chitty, *supra* note 26, at 700 (stating that if the offender "has nothing to urge in bar, he frequently addresses the court in mitigation of his conduct, and desires their intercession with the king, or casts himself upon their mercy").

33. Barrett, *supra* note 22, at 117 (citing 4 William Blackstone, *Commentaries on the Laws of England* 376 n.8 (1769)). However, according to Blackstone, the defendant could be indicted again. See *id.*

34. 4 Blackstone, *supra* note 28, at 1030. After being discharged from the sentence of the secular court, the offender was "delivered over to the ordinary, to be dealt with according to the ecclesiastical canons," where he was usually acquitted. *Id.* at 1032. The benefit of clergy was generally allowed only in "petit treason and capital felonies." *Id.* at 1034.

35. See *id.* at 1031-33 (describing the development of the benefit of clergy); see also 1 Stephen, *supra* note 28, at 487 (stating that the benefit was extended first to those who could read, then to everyone, but that the range of crimes to which it applied was constricted).

36. John H. Dawson, Jr., Note, *Federal Rules of Criminal Procedure—Court Should Afford Defendant a Personal Opportunity to Speak Before Sentence Is Pronounced*, 6 Am. U. L. Rev. 117, 118 (1957).

37. But see Barrett, *supra* note 22, at 126-27 (describing one of a small minority of American cases in which a new trial was granted based on a denial of allocution).

38. See *id.* at 116-21 (describing discussions of allocution by John Frederick Archbold, Blackstone, Chitty, Francis Wharton, and Joel Prentiss Bishop). But see 4 Blackstone, *supra* note 28, at 1034. I do not dismiss the argument that allocution should be a robust practice

list of permissible allocutions at English common law, I can glean a few potential purposes. First, the practice was an opportunity to correct errors. For example, a defendant could state at allocution that he was not the same person who was convicted and that he should not be executed.³⁹ Second, allocution could be viewed as a substitute for modern defenses, particularly excuse defenses. Insanity is the most obvious example of this; the offender could assert in his allocution a ground for relief from judgment that, in a modern trial, would be a complete defense. Pardons, which may have been granted in cases of accidental homicide or self-defense,⁴⁰ could be seen in this light. An allocution requesting a pardon basically alleged that the conviction was not deserved because the offender either did not satisfy all the elements of the offense, as in an accident, or was justified in his conduct, as in self-defense. If allocution, as a historical practice, was a means to correct errors or allow for defenses not provided by law, the practice might have little modern meaning given the advent of statutory and common law defenses and other changes in criminal law and procedure.

2. Changes in Criminal Practice

Significant, and perhaps critical, differences exist between defendants of a few hundred years ago and those today. Some suggest that we continue to allocute merely out of habit and that the practice has little practical effect or symbolic value.⁴¹ Among other things, critics of allocution point to the changes in criminal law and procedure since its origins.⁴² First, defendants did not have the right to testify on their own behalf at trial as they do now. At common law, the defendant's one opportunity to speak to the court came at the sentencing phase.⁴³ Second, many more offenses carried the death penalty and the nature of capital sentencing has changed over time. Third, at the time, a defendant did not have the right to assistance of counsel, so

because of its long pedigree and centrality to sentencing at common law; however, I hope to investigate additional theories that give contour and depth to the practice.

39. See Barrett, *supra* note 22, at 120, 121 & n.27 (citing 1 Chitty, *supra* note 26, at 698); see also *id.* at 129, 130 & n.71 (describing *Messner v. People*, 45 N.Y. 1 (1871), an 1871 New York capital case, quoted as saying that allocution was a practice that "the wisdom and experience of ages has found necessary for the protection of the innocent").

40. See 3 Stephen, *supra* note 28, at 38-41.

41. See Barrett, *supra* note 22, at 253-55.

42. See *id.*; see also Jonathan Scofield Marshall, Comment, *Lights, Camera, Allocution: Contemporary Relevance or Director's Dream*, 62 Tul. L. Rev. 207, 221 (1987). But see *Green v. United States*, 365 U.S. 301, 304 (1961) ("[W]e are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century But 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 these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation.").

43. *Green*, 365 U.S. at 304; see also *Harris v. New York*, 401 U.S. 222, 225 (1971) (stating that the defendant has a constitutional right to testify on his own behalf).

any plea on his behalf at sentencing would have to come through the offender himself.⁴⁴

The first major change since allocution's common law origins is that defendants can now testify on their own behalf at trial. However, they generally do not. Most significantly, the prevalence of plea bargains⁴⁵ means that fewer and fewer defendants ever have the chance to tell their stories at trial. Defendants who plead guilty knowingly waive their trial rights. However, defendants' decisions to plea often will not be based on a desire to stay silent. More likely, defendants plea because of the strength of the evidence against them, the risk of conviction of a more serious offense if they do not, or incentives in the sentencing practice and structure. The fact that many defendants plea and waive their right to testify at trial does not *require* that they be heard elsewhere. It only shows that, as a practical matter, the right to testify at trial has not drastically increased the number of defendants that are heard prior to allocution.

Historically, because the punishment for most felonies was death, allocution developed largely for use in capital cases.⁴⁶ In the early criminal cases in the United States, courts protected allocution more jealously in capital cases than in noncapital cases.⁴⁷ However, the number and type of offenses that carry the death penalty have significantly dwindled over time.⁴⁸ The capital sentencing hearing has also changed. The penalty phase is now a bifurcated proceeding, where the jury, and not a judge, often determines the sentence.⁴⁹ Defendants are now constitutionally entitled to present mitigation evidence.⁵⁰ In contrast to the historical practice, some capital defendants who allocute may be cross-examined or required to swear to the content of their speech.⁵¹

44. *Green*, 365 U.S. at 304.

45. See *supra* notes 3-5 and accompanying text.

46. See generally Barrett, *supra* note 22 (discussing which jurisdictions limited the right of allocution to capital trials); see also Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 Harv. L. Rev. 821, 821 n.2 (1968) (stating that "[t]hroughout most of the history of English criminal law after the time of Henry III, death was the mandatory punishment for any felony, except petty larceny and mayhem").

47. Barrett, *supra* note 22, at 125-43 (describing the treatment of allocution in a number of U.S. jurisdictions and noting that several, including Florida, Illinois, and New Mexico, protected allocution only in capital trials). But see *Sarah (A Slave) v. The State*, 28 Ga. 576 (1859), an early capital case in Georgia in which a slave was convicted of attempting to poison her owner's family and the court found that failure to allocute was not reversible error, primarily, the court stated, because Sarah was represented by a lawyer.

48. *Woodson v. North Carolina*, 428 U.S. 280, 289-93 (1976).

49. See Stephen Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 13-15 (1980); see also *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002).

50. See *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); see also *McKoy v. North Carolina*, 494 U.S. 433 (1990).

51. This practice varies by jurisdiction. See, e.g., Joseph E. Wilhelm & Kelly L. Culshaw, *Ohio's Death Penalty Statute: The Good, the Bad, and the Ugly*, 63 Ohio St. L.J. 549, 576-77 (2002) (stating that the defendant can choose at the penalty phase, under Ohio's sentencing scheme, whether to make a statement to the jury under oath, which is then subject to cross-examination). See generally J. Thomas Sullivan, *The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation*,

Third, unlike at common law, a person convicted of a criminal offense has the benefit of counsel at sentencing. At this phase, an attorney for the defendant may speak and present evidence or testimony on her client's behalf. She can also try to correct errors in the presentence investigation or sentencing guidelines determination or file a separate sentencing memorandum. Finally, she can file post-sentencing motions to correct trial or sentencing mistakes. At common law, the defendant had none of this assistance. His primary avenue for these functions was allocution.

From this history, two approaches could be taken. The first is that allocution should be protected because of its long pedigree. On the other hand, limitations or exceptions to the practice could be advocated because of the changed procedural and substantive protections offered to criminal defendants. The question still remains: Why did courts give the "last word" to defendants and do those concerns animate modern criminal practice?

B. *Modern Allocution Statute and Case Law*

The treatment of allocution by state and federal statutes and courts offers clues about the vigor with which the right of allocution is being enforced and the reasons to allow or deny it. The picture that emerges is that allocution is consistently provided for and protected, to varying degrees, by statute and constitution; and when faced with close questions, or denial of the ability to allocute, courts differ over the importance and purpose given to the practice. Additionally, some courts and legislatures treat allocution at a death penalty hearing differently from other criminal cases; I will briefly examine this difference. I conclude that the extent of enforcement of the right cannot be defined without first determining the underlying purpose of allocution.

1. Protected by Statute and Constitution

Both statute and, to some extent, constitutional due process provisions protect the practice of allocution. Many state and federal statutes explicitly provide the right to allocution before a sentence is imposed.⁵² In noncapital cases, this testimony is almost always unsworn and not subject to cross-examination.⁵³ The statutory description of the topic of the defendant's

15 N.M. L. Rev. 41 (1985) (arguing that the defendant's allocution should not be subject to impeachment by the prosecution); Caren Myers, Note, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 Colum. L. Rev. 787 (1997).

52. See, e.g., Fed. R. Crim. P. 32(i)(4)(A)(ii); see also Cal. Penal Code § 1200 (West 2004); Colo. Rev. Stat. § 16-11-102 (2006); Kan. Stat. Ann. § 22-3422 (2000).

53. See, e.g., Fed. R. Crim. P. 32(i)(4)(A); *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 857-58 (Pa. 1989) (noting that allocution, as traditionally understood, did not allow for cross-examination, but permitted it in the death penalty case before the court); see also David J. Novak, *Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors*, 50 S.C. L. Rev. 645, 673 n.183 (1999) (listing state courts that allow an unsworn plea to a capital jury by a defendant). But see *United States v. Hall*, 152 F.3d 381,

allocution varies by state, but often refers to the ability to speak about mitigating facts⁵⁴ and present himself to the court.⁵⁵

The ability of a defendant to speak before sentencing may be protected by the Due Process Clause. The U.S. Supreme Court has not clearly stated whether the denial of allocution constitutes a federal due process violation.⁵⁶ The federal courts of appeals are split on the issue,⁵⁷ as are the federal district courts.⁵⁸ Several states have interpreted their constitutions to provide an independent constitutional right to allocute⁵⁹ or have explicitly included allocution in their constitutions.⁶⁰

When determining whether the defendant's statutory or constitutional right to allocute has been denied, courts examine whether the defendant was informed of his ability to allocute, whether he stated a desire to allocute,⁶¹

391-92 (5th Cir. 1998) (finding no common law right to make an unsworn statement to a capital jury).

54. See, e.g., Md. R. 4-342(f) (Allocution and information in mitigation) ("Before imposing sentence, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.").

55. See, e.g., Me. R. Crim. P. 32 (requiring the court to ask the defendant if he wishes "to be heard").

56. See *United States v. Hill*, 368 U.S. 424, 428 (1962) ("The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional."). In *Hill*, the defendant did not request the opportunity to make a statement. See also *McGautha v. California*, 402 U.S. 183, 218 & n.22 (1971), *vacated sub nom.*, *Crampton v. Ohio*, 408 U.S. 941 (1972) (stating that the Court has not addressed whether a judge's refusal to allow a convicted defendant to allocute is a constitutional violation).

57. Compare *Boardman v. Estelle*, 957 F.2d 1523, 1525-26 (9th Cir. 1992) ("Sentencing is a critical stage of the criminal process," and "the right of the defendant to personally address the court . . . is an essential element of criminal defense."), and *United States v. Jackson*, 923 F.2d 1494 (11th Cir. 1991) (same), and *United States v. Moree*, 928 F.2d 654, 656 (5th Cir. 1991), and *Ashe v. North Carolina*, 586 F.2d 334, 335-36 (4th Cir. 1978) (stating that the refusal of a defendant's request for allocution constitutes a denial of due process), with *United States v. Li*, 115 F.3d 125, 132-33 (2d Cir. 1997) (stating that allocution is "an 'absolute right' in the federal courts," but not a constitutional right), and *United States v. Coffey*, 871 F.2d 39, 40 (6th Cir. 1989) (stating that there was no constitutional right), and *United States v. Prince*, 868 F.2d 1379, 1396 (5th Cir. 1989) (stating that there was no constitutional violation when defendant did not request allocution), and *Lunz v. Henderson*, 533 F.2d 1322, 1328 (2d Cir. 1976) (upholding the court's denial of defendant's request to speak, where the court found that the trial judge thought that the defendant was attempting to interrupt sentencing by his request).

58. See, e.g., *McKinney v. Delaware*, No. CIV.A. 97-340, 2000 WL 1728276 (D. Del. May 3, 2000) (stating that the denial of allocution would be a due process violation (citing *Boardman*, 957 F.2d at 1526-27)).

59. *State v. Chow*, 883 P.2d 663, 668-69 (Haw. Ct. App. 1994) (citing *Schutter v. Soong*, 873 P.2d 66, 87 (Haw. 1994)); *State v. Rogers*, 4 P.3d 1261 (Or. 2000); *Harvey v. State*, 835 P.2d 1074, 1081-82 (Wyo. 1992) (citing *Christy v. State*, 731 P.2d 1204, 1207 (Wyo. 1987)). But see, e.g., *People v. Brown*, 665 N.E.2d 1290, 1318 (Ill. 1996).

60. See R.I. Const. art. 1, § 10 (guaranteeing that a person accused of a crime "shall be at liberty to speak for [himself]").

61. See, e.g., *People v. Lucero*, 3 P.3d 248 (Cal. 2000) (finding no due process violation for failure of the sentencing court to sua sponte offer defendant right of allocution); *State v.*

and what the defendant would have said. Further, even if the sentencer does not invite the allocution, courts generally have found the right fulfilled as long as the defendant is allowed to speak when he requests to do so.⁶²

For the most part, courts have not given sustained attention to the values implicit in the practice or the reasons why it should, or should not, be protected. Courts consistently fail to discuss why the factors they cite—such as the defendant's assertion of his right to allocute and the content of his allocution—are relevant. The Supreme Court in *Green v. United States* discussed two rights that the defendant has in allocution—loosely, the right to speak for himself and the right to present mitigation.⁶³ Yet, the Court never addressed what happens when only one of these rights is implicated, or when one could be fulfilled through other means. Subsequent federal and state decisions include language supporting either a mitigation or a humanization rationale, but do not delineate why this rationale should be prioritized. In crafting the statutory protections for allocution, legislatures, likewise, have not coherently articulated their rationale for allocution.⁶⁴

2. Capital Cases

In capital cases, courts generally recognize the ability of defendants to allocute and the historic origins of the right in capital cases.⁶⁵ However, the

Gervasi, 69 P.3d 1074 (Idaho Ct. App. 2003) (finding that the defendant's rights were violated, under state rule of criminal procedure, when the court failed to give the defendant an opportunity to speak at sentencing). There is also doubt over whether Federal Rule of Criminal Procedure 32 requires allocution at sentencing on a violation of probation. *See Coffey*, 871 F.2d at 41 (finding that allocution is not required at violation re-sentencing under the rule); *United States v. Turner*, 741 F.2d 696, 699 (5th Cir. 1984) (stating that the right must be given "when deferred sentence is imposed following a revocation of probation"); *United States v. Core*, 532 F.2d 40 (7th Cir. 1976) (stating that allocution was not required).

62. *See, e.g., McKinney*, 2000 WL 1728276, at *7-9 (denying habeas relief based on a denial of allocution when the defendant was given time to address the court, despite the judge's failure to invite him to speak and pronouncement of the sentence he intended to impose before the defendant started speaking).

63. *See Green v. United States*, 365 U.S. 301, 304 (1961) ("None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation.").

64. States use different language to describe the defendant's ability to speak at sentencing. Some states use the common law formulation. *See, e.g., Kan. Stat. Ann. § 22-3422* (1995) (instructing the court to ask "whether [the defendant] has any legal cause to show why judgment should not be rendered"). Some specifically mention the ability to present mitigation. *See, e.g., W. Va. R. Crim. P. 32(c)(3)(C)* (telling the court to personally address the defendant and "determine whether the defendant wishes to make a statement and to present any information in mitigation of sentence"). Others articulate an ability "to be heard." *See, e.g., Wis. Stat. Ann. § 972.14(2)* (West 1998) (allowing the "defendant an opportunity to make a statement with respect to any matter relevant to the sentence"); *Me. R. Crim. P. 32(a)(2)*.

65. *United States v. Hall*, 152 F.3d 381, 391-95 (5th Cir. 1998) (noting that there is no right under federal criminal procedure rules or common law to make an unsworn statement to the jury and that the rule is complied with when the defendant makes a statement to the district court, even though sentence is already determined), *abrogated on other grounds by United States v. Martinez-Salazar*, 528 U.S. 304 (2000); *see also id.* at 394 (citing

extent of allocation protection for capital defendants varies from jurisdiction to jurisdiction, despite the origins of the practice in capital cases and the increased protection for allocation by early American courts.⁶⁶ For example, in capital cases, courts have refused to allow the defendant to make an unsworn statement to the jury⁶⁷ or to make a statement to the jury without being cross-examined.⁶⁸

Due to the severity of the punishment and the attendant heightened procedural protections, the sentencing phase of death penalty cases has received significantly more attention than noncapital cases.⁶⁹ The life stories of defendants are most often told in the death penalty sentencing phase.⁷⁰ Sentencing evidence is a significant portion of the preparation and defense strategy.⁷¹ Thorough lawyers for persons facing capital charges may spend weeks or months focused on this part of the trial.⁷² They also invariably present evidence that seeks to both mitigate the defendant's culpability⁷³ and humanize him in the eyes of the jury.⁷⁴ These "life stories" show the individual defendant's background and character traits. Nonetheless, this complex and contextualized portrait of the defendant does not, necessarily, demand that he speak on his own behalf.

conflicting state court cases on the extent of common law protection of unsworn statements by the defendant to a jury).

66. See *supra* notes 46-51 and accompanying text.

67. See, e.g., *Hall*, 152 F.3d at 391-94.

68. See, e.g., *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 857-58 (Pa. 1989).

69. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (stating that because "the penalty of death is qualitatively different from a sentence of imprisonment . . . there is a corresponding difference in the need for reliability in the determination that death is [appropriate]").

70. See Austin Sarat, *Narrative Strategy Death Penalty Advocacy*, 31 Harv. C.R.-C.L. L. Rev. 353, 353 & n.2, 367 (1996) (relaying conversations with death penalty defense attorneys about narratives they construct about their clients).

71. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 320 (1983) ("Counsel's obligation to discover and appropriately present all potentially beneficial mitigating evidence at the penalty phase should influence everything the attorney does before and during trial . . ."); see also Welsh S. White, *A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants*, 102 Mich. L. Rev. 2001, 2009 (2004) ("For more than two decades, however, experienced capital-defense attorneys have recognized that introducing mitigating evidence explaining the defendant's background and history to the penalty jury is generally the best way to dissuade the jury from imposing a death sentence.").

72. See, e.g., Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329, 336 (1995) (reporting on the time and expense of litigating a capital case at the guilt and sentencing phases). Many attorneys defending clients facing the death penalty, however, do not have the expertise, resources, or time necessary to mount a good, or even constitutionally adequate, mitigation phase. See *id.*

73. See *Lockett v. Ohio*, 438 U.S. 586, 597 (1978) (stating the defendant's right to present evidence supporting a lesser sentence).

74. See generally Sarat, *supra* note 70; see also Doyle, *supra* note 18; Goodpaster, *supra* note 71, at 335 (stating that "portray[ing] the defendant as a human being" is part of an effective defense in a capital case); Haney, *supra* note 15.

In sum, the current treatment of allocution by the courts does little to clarify the basis and extent of allocution's protection and fails to consider carefully its purpose. Absent an understanding or discussion of *why* we protect allocution, we will be left with the current hodgepodge of appellate court opinions and unsatisfactory answers to the question of whether allocution is protected and under what circumstances.

C. *Changes in Current Sentencing Law and Practice*

Allocution does not occur in a vacuum. The possible sentences and the evidence that is relevant at sentencing are controlled by state statute and court practice. These sentencing structures form the boundaries within which allocution takes place.

Especially under federal and state sentencing guideline systems, the words spoken at sentencing by counsel are hemmed in by statute and constrained by rules about what facts in a person's life are relevant under a particular jurisdictions' sentencing structure. For example, under the U.S. Sentencing Guidelines, the youthfulness of an offender is deemed generally to be irrelevant.⁷⁵ In part, these limitations are based in notions of equal protection and fair play.⁷⁶ However, the mandatory guidelines also silence relevant sentencing stories⁷⁷ and constrain permissible mitigating evidence. The result can be pro forma sentencing hearings. It is difficult to imagine that any of us, however terrible our worst act, would want our life summed up with, "Please sentence within the standard range, your Honor."

In *Blakely v. Washington*⁷⁸ and *United States v. Booker*,⁷⁹ the U.S. Supreme Court shifted the national sentencing landscape.⁸⁰ On their face,

75. See U.S. Sentencing Guidelines Manual § 5H1.1 (2006); see also Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 Stan. L. Rev. 37, 51 (2005) (calling factors such as this one "ethically relevant" and noting that constraining them does not agree with our sense of what should be relevant); Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 Colum. J. Gender & L. 169, 169 (1996) ("There are two provisions in the Federal Sentencing Guidelines . . . that make no sense in the real world: one dictates that sex—along with race, national origin, and other factors—is not relevant to sentencing. The other asserts the 'general inappropriateness' of considering 'family ties and responsibilities' in determining the term of imprisonment.").

76. See Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. Colo. L. Rev. 781, 793 (1993) (stating that support for sentencing guidelines from civil rights advocates and others was based on the hope that they would reduce judicial ability to discriminate based on race).

77. Additionally, sentencing stories are limited by counsel's lack of preparation and advocacy. See, e.g., John L. Carroll, *The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative*, 150 PLI/Crim. 199, 121-22 (1989); Stanley J. Roszkowski, *Sentencing Provisions and Considerations in the Federal System*, 13 Loy. U. Chi. L.J. 621, 633-34 (1982) ("It has been my experience that the sentencing phase of a criminal case is often the most neglected. All too often even excellent criminal trial lawyers will perform admirably during pretrial preparation and the trial itself, only to neglect the opportunity to present more fully the defendant's position at the time of sentencing.").

78. 542 U.S. 296 (2004).

79. 543 U.S. 220 (2005).

these cases enforced a Sixth Amendment right to have every fact that increases a sentence beyond a statutory maximum found by a jury using a beyond a reasonable doubt standard.⁸¹ In practice, these cases, and the state court cases interpreting them, have called into question decades of formulaic sentencing guideline systems.⁸² Even in those jurisdictions that continue to abide by guidelines, or at least refer to them, the attention to sentencing practice may make defense attorneys more willing to aggressively pursue sentencing departures and may give judges pause before mechanically imposing guideline sentences.⁸³ In sum, the shifting landscape means that more is at stake during sentencing.⁸⁴

The development of new sentencing structures requires a reexamination of the goals of sentencing and of how the sentencing hearing effectuates these aspirations. It requires new thinking about sentencing theory and practice. The changes in sentencing law do not, explicitly, alter the rules or purpose of allocution. Nor do they answer the question about what should be accomplished through allocution. While a 300-year-old practice,⁸⁵ allocution is an area that has been largely ignored, even before the push to determinate sentencing schemes. Perhaps it merited little attention under sentencing systems which produced formulaic outcomes unrelated to the

80. See, e.g., Douglas A. Berman, *Examining the Blakely Earthquake and Its Aftershocks*, 16 Fed. Sent'g Rep. 307 (2004).

81. *Booker*, 543 U.S. at 232; *Blakely*, 542 U.S. at 301.

82. *Booker*, 543 U.S. at 264. Several states have determined that their sentencing systems are affected by the Court's *Blakely* ruling. See, e.g., *Lopez v. People*, 113 P.3d 713 (Colo. 2005) (en banc); *State v. Allen*, 706 N.W.2d 40 (Minn. 2005) (finding that it is unconstitutional for the court to find that the defendant is not amenable to probation and depart from a presumptively stayed sentence); *State v. Natale*, 878 A.2d 724 (N.J. 2005); *State v. Allen*, 615 S.E.2d 256 (N.C. 2005); *State v. Provost*, 896 A.2d 55 (Vt. 2005). A variety of remedies have been implemented, including making all or part of the state guidelines advisory, see, e.g., *State v. Foster*, 845 N.E.2d 470 (Ohio 2006), and requiring jury determination of sentencing facts that increase the statutory maximum, see, e.g., *State v. Schofield*, 895 A.2d 927 (Me. 2005). The effect of these changes has been to open up the range of possible sentences. Other states have determined that their sentencing structures do not violate the Sixth Amendment because they do not mandate sentencing above a statutorily defined maximum based on judge-found facts. See, e.g., *State v. Stover*, 104 P.3d 969 (Idaho 2005); *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005).

83. See, e.g., *United States v. Bailey*, 369 F. Supp. 2d 1090 (D. Neb. 2005) (granting departure in a child pornography case, based in part on 411 pages of sentencing evidence submitted by the defense). The *Bailey* court commented in its memorandum and order, "The Assistant Federal Public Defender asked me to impose a non-prison sentence on Bailey, a fellow who possessed child pornography, in order to save the defendant's little girl. No way, I thought, hell will freeze over before that happens. I next explain how hell froze over." *Id.* at 1091.

84. Compare *United States v. Lyons*, 450 F.3d 834 (8th Cir. 2006) (affirming a sentence of 180 months, where guidelines provided a range of seventy to eighty-seven months' imprisonment), with Sentencing Memorandum, *United States v. Ranum*, No. 04-CR-31 (E.D. Wis. Jan. 19, 2005) (Adelman, J.) (on file with the Fordham Law Review) (describing the need for consideration of other sentencing directives after *Booker* and sentencing the defendant to a year and a day, when his guideline range was thirty-seven to forty-six months).

85. See *Green v. United States*, 365 U.S. 301, 304 (1961).

life circumstances of individual defendants. However, in light of the increased importance of sentencing, allocution deserves a second look.

II. MITIGATION AND ITS LIMITS

A. *A Mitigation Theory of Allocution*

Mitigation is a commonly cited purpose of allocution.⁸⁶ It is also, perhaps, the most intuitively attractive rationale: Just before the judge issues her sentence, the defendant has a chance to tell in his own words why his sentence should be lessened. These stories implicate the defendant in the offense, but detail why the punishment should be less severe.⁸⁷ These stories may also, but do not need to, accept responsibility for the offense.

The common law practice of allocution⁸⁸ may be based in a theory of mitigation:⁸⁹ reasons why the trial court should view the offender as less responsible for his acts or view the offense as less severe.⁹⁰ For example, pardons could be seen as mitigation instead of as a substitute for contemporary defenses. In particular, pardons granted in cases of accidental homicide or self-defense killings⁹¹ functioned in modern eyes as mitigating evidence. They allowed the defendant to explain at allocution why the customary sentence was unduly harsh. Allowing excuses for pregnancy and insanity suggests that the court understood that, under limited circumstances, there were features of the accused's physical or mental condition that justified a lesser punishment.

However, mitigation is not a required thread of these practices.⁹² For example, benefit of the clergy, which exempted certain persons from the reach of the secular criminal court, could be seen as a jurisdictional defect. This is an allocution that admits the elements of the offense, but denies the court's authority over the defendant.⁹³ Nothing suggests the defendant is *unworthy* of the judgment that would otherwise be imposed. Likewise,

86. See, e.g., *State v. Bowen*, 915 P.2d 120, 123 (Kan. 1996) (finding that the defendant is denied the right of allocution if he is not asked "if he or she has any evidence to present in mitigation of punishment"); *In re Echeverria*, 6 P.3d 573, 576 n.13 (Wash. 2000) (en banc) (noting that, in general, "allocution is a statement in mitigation by a defendant to a sentencing judge").

87. See, e.g., *United States v. Myers*, 150 F.3d 459, 463-65 (5th Cir. 1998) (suggesting that the defendant may have allocuted on the minor role he played in the offense, compared to others, and that the court should have heard this allocution), *abrogated by* *United States v. Reyna*, 358 F.3d 344 (5th Cir. 2004).

88. See *supra* Part I.A.1

89. See Francis Wharton, *A Treatise on Criminal Pleading and Practice* 636 (9th ed. 1889) (mentioning that allocution was made, in part, to "mitigate punishment").

90. The fit is not exact because originally, convicted defendants could either have judgment entered or set aside. See Barrett, *supra* note 22, at 117. Strictly speaking, there was no "lessening" of sentence.

91. See 3 Stephen, *supra* note 28, at 38.

92. See *supra* notes 38-40 and accompanying text.

93. See 4 Blackstone, *supra* note 28, at 1031 (describing the origins of benefit of clergy as an exemption of clergy from the authority of the secular criminal court).

insanity might not be viewed as "mitigation" in modern eyes, as it eliminates the offender's criminal liability.⁹⁴

Modern cases support a mitigation theory as well. As an example, courts that provide less protection for allocution in death penalty sentencings may be operating implicitly on the assumption that the purpose of allocution is mitigation. Using this assumption, they look to robust protection given to the presentation of mitigating evidence at capital sentencing hearings. This mitigation is usually conveyed to the sentencing judge or jury by defendant's counsel. Then, in reviewing whether the defendant has the right to allocute or the extent of such a right, courts may draw the conclusion that the function of allocution has been adequately protected by counsel's ability to present mitigation. Supporting this leap in reasoning is the emphasis on appeal of the effective assistance of capital counsel in presenting mitigating evidence.⁹⁵

As another example, some courts have focused explicitly on the content of the defendant's possible statement at allocution and discussed whether it would have made any difference.⁹⁶ The federal courts are mixed over whether a violation of Federal Rule of Criminal Procedure 32, the protection for allocution of federal defendants, can be a harmless error.⁹⁷ Over thirty years ago, the Supreme Court suggested that a Rule 32 violation would require remand and resentencing.⁹⁸ However, federal courts since have read these violations as subject to harmless error and plain error

94. See, e.g., Wayne R. LaFave, *Criminal Law* 369 (4th ed. 2003).

95. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005) ("This case, like some others recently, looks to norms of adequate investigation in preparing for the sentencing phase of a capital trial, when defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation."). Conversely, decreased protection for allocution in modern capital sentencing hearings is called into question if allocution is based in a theory of humanization. Certainly, capital defense attorneys strive to humanize their clients. See Doyle, *supra* note 18; Goodpaster, *supra* note 71, at 335; Sarat, *supra* note 70. Yet, appellate review of their actions rarely recognizes this as a required function of counsel, unlike mitigation. If allocution is based in humanization, the distinct treatment of the allocution of capital defendants may not be tenable.

96. See, e.g., *United States v. Sarno*, 73 F.3d 1470, 1503-04 (9th Cir. 1995) ("The denial was not harmless because the district court had the discretion to sentence [the defendant] to a shorter sentence."); *Sellman v. State*, 423 A.2d 974 (Md. 1981) (reversing and remanding for resentencing after the defendant was denied a request to speak; and noting that the trial court could decrease the defendant's sentence in response to the allocution).

97. Compare *United States v. Myers*, 150 F.3d 459, 463 (5th Cir. 1998) (finding that denial of allocution is not harmless error and that "remand is necessary even when the judge's comments, at the sentencing hearing or elsewhere, indicate that the judge would remain unmoved in the face of anything the defendant has to say"), and *United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (requiring resentencing), and *United States v. De Alba Pagan*, 33 F.3d 125, 129-30 (1st Cir. 1994) (same), with *United States v. Riascos-Suarez*, 73 F.3d 616, 627 (6th Cir. 1996), and *United States v. Leasure*, 122 F.3d 837, 840-41 (9th Cir. 1997), and *United States v. Cole*, 27 F.3d 996, 999 (4th Cir. 1994), and *Boardman v. Estelle*, 957 F.2d 1523, 1530 (9th Cir. 1992), and *Ashe v. North Carolina*, 586 F.2d 334, 337 (4th Cir. 1978). For state cases criticizing the application of harmless error, see *Mohn v. State*, 584 P.2d 40 (Alaska 1978); *People v. Emig*, 493 P.2d 368, 369-70 (Colo. 1972); *Tomlinson v. State*, 647 P.2d 415 (N.M. 1982).

98. *Van Hook v. United States*, 365 U.S. 609 (1961).

analysis.⁹⁹ Those courts that apply a harmless error standard consider what the defendant would have said¹⁰⁰ and whether his sentence was high or low compared with the guidelines or standards for that court.¹⁰¹ These courts seem more concerned with a mitigation rationale. They assume implicitly that the crux of the allocution is the defendant's ability to give information that will influence the sentence.¹⁰² In this light, the mere use of a harmless error-type analysis *might* signal more support for a mitigation theory of allocution. This is tentative, though. There are other reasons unrelated to the purpose of allocution—such as efficiency or conservation of resources—that a court might prefer harmless error review.

Further, mitigation is consistent with at least some theories of punishment and more pragmatic policy concerns. For example, the ability to present mitigation at allocution dovetails with retributive theories. Put in an oversimplified way, a defendant who is less blameworthy or whose conduct is not as offensive deserves less punishment than someone who is more blameworthy or whose crime was more serious. Allowing the defendant to give this information to the judge lets her better determine a fitting punishment. A mitigation purpose complements the policy goal of accurate sentencing by permitting the offender to convey information to the judge that is necessary to a correct sentencing under the jurisdiction's sentencing system.

B. *What If Nothing the Defendant Can Say Will Mitigate His Sentence?*

Basing allocution on a theory of mitigation presupposes that the allocution can *matter*. In fact, in a regime where sentencing judges have discretion, even within guideline ranges, the information presented at sentencing can often have a significant effect on the sentence imposed. However, other sentencing laws significantly constrain or even eliminate this discretion. Mandatory minimum sentences are the foremost example. Included in these mandatory sentences are the many states that require life imprisonment for persons convicted of some homicides and sexual assaults

99. See, e.g., *United States v. Reyna*, 358 F.3d 344, 347-53 (5th Cir. 2004) (en banc) (rejecting prior automatic reversal and applying Fed. R. Crim. P. 52(b) plain error analysis to denial of allocution—reasoning that the Court has applied Rule 52 harmless error and plain error analysis without regard to the seriousness of the error and, therefore, a denial of allocution under Rule 32 would also be subject to this analysis); *Leasure*, 122 F.3d at 840 (stating that the denial of Rule 32 allocution was subject to harmless error); *Riascos-Suarez*, 73 F.3d at 627 (same); *Cole*, 27 F.3d at 999 (same).

100. See *United States v. Lewis*, 10 F.3d 1086, 1092 (4th Cir. 1993) (finding a violation of the federal court rule on allocution, but finding that the error was not prejudicial because “[n]othing Dickerson might have said in allocution could have reduced his sentence, for he received the shortest sentence allowed by statute”); see also *Cole*, 27 F.3d at 999 (finding plain error and vacating sentence, where defendant did not address the court and “the possibility remains that an exercise of the right of allocution could have led to a sentence less than that received”).

101. See *Lewis*, 10 F.3d at 1092.

102. See, e.g., *Krahn v. Tahash*, 274 Minn. 567, 567 (1966) (stating that it would be an “empty gesture” to allow the defendant to speak after being sentenced).

or third-strike offenses.¹⁰³ Also included are a significant number of drug and weapons statutes that require a mandatory minimum penalty.¹⁰⁴ In these cases, allocution cannot matter.¹⁰⁵

If mitigation is the core purpose of allocution, offenders facing mandatory sentences have nothing to say.¹⁰⁶ If sentences cannot be mitigated, the ability to allocute does not need to be protected for these offenders. In practice, legislatures are not carving out exceptions to allocution statutes based on whether a mandatory sentence will be imposed. Mandatory minimums are the starkest example of sentences that call into question the mitigation rationale, or perhaps the relevance of allocution itself.

Further, the continued protection of allocution, despite the historic shift to counsel for accused defendants, suggests that mitigation is not the core purpose behind the modern practice. Competent defense counsel at sentencing can effectively present mitigating facts on behalf of her client.¹⁰⁷ In fact, it is counsel's duty,¹⁰⁸ and she has a number of means available to carry it out. To convey this mitigation to the court, defense counsel can call witnesses for the defense, present documents or other exhibits, or make representations about the client. If the purpose of allocution is limited to mitigation, the defendant's speech is, at best, cumulative, because counsel can fulfill this function. The defendant's ability to speak on his behalf and express himself sincerely would not matter. Counsel's representations could render the allocution a mere appendage—an historic anomaly with no modern purpose.¹⁰⁹

103. See, e.g., Mich. Comp. Laws Ann. § 750.316 (West 2004) (requiring mandatory life without parole for first-degree murder).

104. See, e.g., 18 U.S.C. § 924(c) (2000) (imposing a mandatory consecutive sentence for a person who "uses or carries a firearm" during a crime of violence or drug trafficking offense); *id.* § 924(e) (requiring a minimum fifteen-year mandatory sentence for a gun offense for certain repeat offenders); 21 U.S.C. § 841(a)(1), (b)(1) (requiring mandatory minimum sentences for certain drug trafficking offenses).

105. *Cf.* State v. Ferman-Velasco, 41 P.3d 404, 410-12 (Or. 2002) (finding, in a state that recognizes a constitutional right to allocution, no due process violation for imposition of a mandatory minimum, and no right of the sentencing court to give a lesser sentence). I could not find any systematic attempt to determine whether or not defendants facing mandatory life imprisonment or other mandatory sentences exercise their ability to allocute.

106. Offenders facing lesser mandatory minimums may wish to allocute in mitigation, because in some cases they will be eligible to receive a greater sentence than the mandatory minimum and could allocute to "mitigate" their sentence to the least required by law.

107. At least two distinct sets of concerns are lumped into the term "competent" defense counsel. First, there is the competence of counsel as an attorney, especially in light of caseloads of public defenders and others that represent the bulk of criminal defendants. A second concern is the ability of even capable attorneys to understand what is important mitigation to their clients and to translate meaningfully the client's concerns into the language of sentencing mitigation.

108. See Wiggins v. Smith, 539 U.S. 510, 523-25 (2003); Williams v. Taylor, 529 U.S. 362, 395-96 (2000).

109. Couch v. United States, 235 F.2d 519, 525 (D.C. Cir. 1956) (Miller & Bastian, J.J., concurring in affirmance and dissenting in part) ("We see no reason for the trial judge to ask the defendant personally if he wishes to make a statement when a statement has already been

Yet judges, scholars, and laypeople still expect to hear from the defendant at sentencing. There is a sense that the defendant's own words add "something" that cannot be otherwise conveyed by counsel.¹¹⁰ Even a well-trained and prepared defense attorney will not necessarily be able to convey the same points to the court that the defendant himself can.¹¹¹ The attorney presents the desired evidence or testimony in a polished and legally relevant way. But the convicted defendant could have a role to play. The defendant is the owner of the allocution story and should ultimately control the message conveyed to the court on his behalf.¹¹² This is especially significant in the context of indigent criminal defendants who may appropriately resent or disagree with the characterizations of their lives that have been given by state authorities.¹¹³ This is the "something" that gives allocution modern relevance.

C. *Non-mitigation Stories*

Mitigation does not encompass all of the stories that have been, or could be, told at allocution. Allocution stories never have been limited to the presentation of information that lessens—i.e., mitigates—the defendants' blameworthiness. Instead, defendants also have focused on stories of mercy, innocence, and defiance. I examine these ways of allocuting and question whether they ever should be included in allocution.

1. Mercy

At sentencing, many defendants want mercy. They have either been found guilty or admitted their guilt of a criminal offense. They stand before the sentencer, often with little to offer as an excuse for their conduct. They hope for mercy, and allocution is their opportunity to ask for it.

Mercy could be seen as equivalent to mitigation. The defendant states that for some reason he deserves to be punished less severely than he

made for him by his counsel and where the court is not advised by defendant or his counsel that the defendant wishes to make a statement personally.”).

110. See *Green v. United States*, 365 U.S. 301, 304 (1961) (stating that defendant must be given the right personally to speak, not through counsel); see also *United States v. Myers*, 150 F.3d 459, 461 (5th Cir. 1998) (“As the Supreme Court recognized, Rule 32 envisions a *personal* colloquy between the sentencing judge and the defendant.”).

111. See *Green*, 365 U.S. at 304 (“The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.”).

112. Cf. Kathleen A. Sullivan, *The Perils of Advocacy: Listening, Labeling, Appropriating*, in *Hard Labor: Women and Work in the Post-Welfare Era* 191, 199-203 (Joel F. Handler & Lucie White eds., 1999) (pointing out, in the context of mothers on welfare, that these women's stories are misappropriated by the child welfare system and that well-intentioned poverty lawyers may commit the same error by, for example, characterizing the stories of their clients in ways that the clients themselves would not recognize or by using, without the clients' input, the confidential and private information gained through representation to tell a favorable story).

113. See *id.* at 199.

otherwise would, and asks the judge to impose this merciful sentence.¹¹⁴ This view of mercy is consistent with a retributive purpose of punishment because it argues that lessening of the sentencing is based on what the defendant deserves.¹¹⁵

Another view of mercy is that it is distinct from mitigating facts.¹¹⁶ Here, mercy does not mean that the defendant *deserves* a lesser punishment. Instead, mercy can be exercised without reason or cause.¹¹⁷ Under this view, mercy does not rely on the accuracy of some fact about the offense or the offender.¹¹⁸ Instead, it relies on sympathy or empathy for the defendant.¹¹⁹ While not necessarily the dominant view of mercy, this

114. See Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, in *Character, Liberty, and Law: Kantian Essays in Theory and Practice* 59, 79-80 (1998) [hereinafter Murphy, *Repentance, Punishment, and Mercy*] (suggesting two ways of looking at mercy under a retributive justice paradigm); see also Jeffrie G. Murphy, *Mercy and Legal Justice*, in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* 162, 169-72 (1990) [hereinafter Murphy, *Mercy and Legal Justice*]. Murphy and others draw the distinction between mercy that is deserved, which fits with a retributive justice system, and mercy that is not deserved, which does not comport with retributive justice, because the offender is not receiving the sentence he justly deserves; instead he is receiving a lesser sentence. See generally Martha C. Nussbaum, *Equity and Mercy*, in *Punishment: A Philosophical & Public Affairs Reader* 145 (1995).

115. See Murphy, *Repentance, Punishment and Mercy*, *supra* note 114, at 79-80.

116. See Murphy, *Mercy and Legal Justice*, *supra* note 114, at 172-73 (discussing mercy that calls for lessening punishment beyond what is justly deserved, but rejecting it); see also Nussbaum, *supra* note 114, at 163 (distinguishing particularity of justice—fine-tuning the circumstances of the offense and offender to arrive at a just punishment—from mercy). But see generally Sullivan, *supra* note 51 (discussing the ability to allocute in a capital sentencing hearing and not making a distinction between appeals to mercy and mitigation evidence). Sullivan argues that, in part because the defendant's allocution is a plea for mercy and not a statement of contested facts, the allocution does not call for impeachment. See *id.* at 63.

117. See, e.g., *United States v. Dabait*, 231 F.3d 979, 981 (5th Cir. 2000) (*per curiam*) (stating that one key function of allocution is to allow the defendant "one more opportunity before conviction 'to throw himself on the mercy of the court'" (quoting *United States v. Myers*, 150 F.3d 459, 463 (5th Cir. 1998))), *abrogated by* *United States v. Reyna*, 358 F.3d 344 (5th Cir. 2004). While this view of mercy is not consistent with retributive punishment, in that the defendant receives a lesser sentence than he actually deserves, the analysis still coincides with a retributive view, in that the desert of the defendant is viewed as a primary, relevant consideration.

118. See, e.g., *State v. Lord*, 822 P.2d 177, 216 (Wash. 1992) ("Allocution is a plea for mercy; it is not intended to advance or dispute facts.").

119. See Haney, *supra* note 15, at 1453. Haney states,

The tendency to extend mercy to those with whom we feel kinship was recognized in Thomas Green's study of jury nullification by thirteenth and fourteenth-century English juries. [Green] observed that:

[T]he leniency accorded villagers by their neighbors may be put down to favoritism, but given what jury behavior in homicide suggests, that may be just another way of saying that jurors thought the rules too harsh when forced to apply them to persons whom they knew well enough to identify with.

Id. (quoting Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800*, at 63 (1985)).

definition holds sway with the public and is rooted in our cultural understanding.¹²⁰

The possibility of mercy, detached from mitigating facts, and the ability of defendants to appeal to mercy, adds something valuable to criminal sentencing. As an initial matter, defendants¹²¹—and their lawyers¹²²—make this appeal. In death penalty cases, the Supreme Court has acknowledged this possibility of mercy and has distinguished an instruction on “sympathy” from the requirement that the jury consider mitigating evidence about the offense and offender.¹²³ This view of mercy, detached from the desert of the defendant, is desirable. Allowing for the possibility of this kind of mercy reinforces the individuality of both the defendant and the sentencer. Allowing the defendant to appeal directly to the judge or jury for mercy affirms the ability of the sentencer to exercise discretion in a wise and humane way.¹²⁴

2. Innocence

Innocence stories could be viewed as an extreme version of mitigation: the defendant’s plea that his lack of culpability merits the minimal sentence. If seen in this way, defendants’ stories about innocence fit within allocution, even if the purpose is limited to mitigation.

Courts do not want to hear allocution stories of innocence.¹²⁵ Most judges assume, often consistent with the evidence they have heard, that the person before them actually has committed the offense and any innocence tale is fiction. These defendants risk and receive harsher sentences because of their perceived failure to accept responsibility, lack of candor with the court, or failure to acknowledge the validity of the fact-finder’s decision.¹²⁶

120. Robert L. Misner, *A Strategy for Mercy*, 41 Wm. & Mary L. Rev. 1303, 1306 (2000) (noting the prominence of mercy in religion, literature, and philosophy).

121. See, e.g., *State v. Keyser*, No. 238 2005, 2005 WL 1331778, at *11-*12 (Del. Super. Ct. June 3, 2005) (weighing, among other factors in its decision to impose a life sentence instead of the death penalty recommended by the jury, the defendant’s plea for mercy during his allocution).

122. See Anthony V. Alfieri, *Mercy Lawyers*, 82 N.C. L. Rev. 1297, 1297 (2003) (describing attorneys who defend prisoners and death-row inmates at clemency as “mercy lawyers”).

123. See *California v. Brown*, 479 U.S. 538, 541 (1987).

124. See, e.g., Nussbaum, *supra* note 114, at 164-65 (discussing Seneca’s original concept of mercy and asserting that “in the end his position is clearly that it is right and correct to assign punishments in accordance with mercy, both because of what it means for oneself and because of what it says about and to the offender”).

125. See, e.g., *Capano v. State*, 781 A.2d 556, 658 (Del. 2001). *Capano* quoted the trial court’s statement to the jury, after the defendant’s allocution, as follows:

Members of the jury, as I indicated before Mr. Capano started his allocution, it’s limited to a very narrow framework, specifically the defendant is not permitted to rebut any facts or to deny his guilt or to voice an expression that contradicts the evidentiary facts that you heard in the trial.

Id.

126. See Martha Grace Duncan, “*So Young and So Untender*”: *Remorseless Children and the Expectations of the Law*, 102 Colum. L. Rev. 1469, 1471 (2002). Duncan criticizes

If judges were to believe innocence stories, a fundamental mistake has been made. How should a judge impose a just sentence upon someone who, if believed, committed no offense? Whether the innocence allocation is the truth or a lie, the court will not see this allocation as useful to sentencing. The offender is making a statement that either aggravates the situation or, at best, calls into question the entire process. Innocence stories may not often be an appropriate use of allocation from the point of view of an efficient or even just system.

Set aside for a moment whether the defendant should be able to tell a false story of innocence. On occasion, an innocence story is true.¹²⁷ Every so often, a defendant who asserts his innocence is, in fact, innocent. Despite the disruptive effect on the process, there are significant reasons to think that allocation should allow for the telling of a true innocence story. Allocation will, except for post-sentencing motions and appeals, be one of the last chances to question or correct an improper conviction. This is very similar to the function that allocation served at common law: an opportunity for the defendant to state any reason why the judgment should not be imposed. Once the sentencing is final, deference will be given to this judgment by an appellate process concerned with, among other things, competence and finality. If there is any chance that a mistake can be discovered without a costly and time-consuming appellate process, the opportunity should be taken. Although increased protections for defendants since allocation's common law origins—including the protection of competent counsel, defendant testimony, and posttrial motions—suggest that this “total mitigation” evidence would be true in even fewer cases now than before, it still does not account for the percentage of cases in which it would be accurate. This *possibility* of truth suggests that a theory of allocation should provide an account of the practice that would allow the telling of innocence stories.

Mitigation does not wholly satisfy this need. Neither does punting to the availability of post-conviction processes that allow defendants and their attorneys to raise issues of innocence.¹²⁸ Something is lacking. What is

courts' assessment of the perceived lack of remorse, particularly in juveniles accused of crimes, and the frequent conclusion that courts can predict future criminal behavior from a lack of remorse. *See id.* For an example of a defendant receiving a harsher sentence based in the defendant's “protestations of innocence,” see *United States v. Li*, 115 F.3d 125, 135 (2d Cir. 1997). Note that the district court stated that, while the defendant's sentence could be increased based on these words, she had the right to say them. *See id.* (“In this instance the district court recognized Lu's ‘perfect right to her protestations of innocence.’”).

127. For example, there have been “192 post-conviction DNA exonerations in the United States.” Innocence Project, Benjamin N. Cardozo School of Law, Facts on Post-Conviction DNA Exoneration (2007), available at http://www.innocenceproject.org/docs/DNA_ExonerationFacts_WEB.pdf (last visited Feb. 19, 2007); see also Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 524, 531 (2005) (finding 340 exonerations and noting that these are just “the tip of an iceberg” because of the difficulty of proving innocence in cases that do not involve DNA).

128. In addition to raising claims of sufficiency of the evidence or errors on direct appeal, the Court has assumed that a habeas corpus claim could lie—under an unspecified

missing is the opportunity—in the unusual case in which an innocent person is convicted—for the convicted person to be able to stand up in open court and to say so. This declaration of innocence will be noted if the defendant later pursues an appeal.¹²⁹ The ability of innocent defendants to speak, in person, to the court also encourages the court to perceive the possibility of wrongful conviction and impress upon the court the importance of careful practice. For the minority of defendants who are convicted but factually innocent, if they wish to express themselves, they should be allowed to give an allocution based in innocence.

3. Defiance

Convicted defendants tell allocution stories of defiance. These stories are about refusal to submit to authority.¹³⁰ Or self-definition. Or righteousness.¹³¹

Like innocence, these are stories that judges do not want to hear. Judges, to the extent that they have preferences for certain allocution stories, value

standard—for a persuasive showing of actual innocence in a capital case. *See* *House v. Bell*, 126 S. Ct. 2064 (2006).

129. See, for example, the case of Eddie Joe Lloyd. Innocence Project, Know the Cases: Eddie Joe Lloyd, <http://www.innocenceproject.org/Content/201.php> (last visited Feb. 19, 2007) (recounting the innocence allocution of Eddie Joe Lloyd, who was exonerated of murder by DNA evidence after serving seventeen years of a life sentence). According to the Innocence Project, at allocution Lloyd stated,

Into each life tears must fall. That means on both sides. MJ [the victim] had a right to live, as we all do. . . . [S]he said goodbye . . . and disappeared in the darkness never to be seen again alive. One day later she was found in a vacant garage. Cold, alone, and lifeless. . . . Eddie Lloyd was focused on as a suspect while he was a mental patient and somewhere along the line was he was [sic] charged and convicted of the crime, a heinous crime, brutal. What I want to say to the court is that, to the family, MJ, to the city of Detroit, to everybody who was involved with the case, I did not kill MJ. I never killed anybody in my life and I wouldn't.

Id. (internal quotation marks omitted).

130. See, e.g., Transcript of Sentencing Hearing, *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), available at <http://www.law.umkc.edu/faculty/projects/ftrials/Chicago7/Sentencing.html> (transcription of the allocutions of the “Chicago Seven” defendants, in which they criticize the court process, the judge, and the actions of the country that convicted them, as well as recommend LSD to the presiding judge).

131. One of the more famous examples of an allocution in this vein was the one given by John Brown, before he was sentenced to death on November 2, 1859. *See* Rachel F. Moran, *Race, Representation, and Remembering*, 49 UCLA L. Rev. 1513, 1531 (2002) (discussing Brown's case and noting that “[f]rom the beginning, Brown understood the importance of using the courtroom as the platform for the righteousness of his cause, rather than the wrongness of his acts. He converted his prosecution into the site for a counternarrative about himself as well as the process used against him”). Brown stated,

I believe that to have interfered as I have done, as I have always freely admitted I have done, in behalf of His despised poor, I did no wrong, but right. Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments, I say let it be done.

Jules Abels, *Man on Fire: John Brown and the Cause of Liberty* 330-31 (1971).

repentance, acceptance, and remorse; not admission and defiance. Defiance stories do not deny commission of the criminal act, but do not apologize. Instead, they challenge the authority of the court, the state, or the law under which defendants were convicted.¹³² There is no apology and no remorse.

Legislators also disfavor defiance allocution stories. Instead, under legislative guidelines, defendants receive more lenient sentencing for "acceptance of responsibility,"¹³³ amenability to treatment, and other factors that suggest a docile, compliant, and penitent offender. As a result, many defense lawyers, especially outside the context of overtly political trials, understandably discourage their clients from telling defiance stories. These tales challenge, or at least defy, a system—a system in which the judge and, to some extent, the attorney, are invested participants.

A defense attorney rarely is in a position to adequately convey her client's defiance story. Foremost is the ethical and professional tension between expressing the client's wishes and attempting to minimize the harm, in the form of incarceration, that is given to the client.¹³⁴ The balance struck by any one lawyer often will depend on factors outside the scope of the client's wishes, such as the attorney's perception of the client's competence or impairment, the degree of harm that the client will suffer, the sentencing court's likely reaction to a defiance story, or the amount of preparation time that the lawyer can spend with the client. This dilemma assumes the client will have conveyed his desire to portray himself in this way to his lawyer and his lawyer, in turn, understands the defiance story. This assumption often will be untrue. The defense counsel may not dedicate the time or have the skills needed for the client to share this priority.¹³⁵ Even a dedicated attorney may not understand the client's goals, perhaps because of barriers of class, race, language, or life

132. See, e.g., Michael S. Lief & H. Mitchell Caldwell, *And the Walls Came Tumbling Down: Closing Arguments That Changed the Way We Live—From Protecting Free Speech to Winning Women's Suffrage to Defending the Right to Die 199-202* (2004) (describing the allocution of Susan B. Anthony after her conviction for voting in a presidential election, in which she expressed her views on the legal system and the government and stated she never would pay the fine imposed on her).

133. See U.S. Sentencing Guidelines § 3E1.1 (2006).

134. Cf. Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 *Fordham L. Rev.* 1581 (2000) (discussing this dilemma in the context of representing clients with mental disabilities); Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness*, 68 *U. Cinn. L. Rev.* 763, 763 (2000) (discussing this tension in the context of making "strategic" trial decisions).

135. See Marcus T. Boccaccini, Jennifer L. Boothby & Stanley L. Brodsky, *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 *Law & Psychol. Rev.* 97, 102 (2002) (citing previous studies that reported criminal defendants were more likely to trust attorneys who "show concern for their interests by keeping them informed about their cases, listening to what they have to say, and spending time with them before court," but that many defense attorneys did not develop or use skills to build client trust).

experience.¹³⁶ Counsel may understand, but believe her client's autonomy is violated if she expresses the client's story in her lawyerly and stilted language.¹³⁷ Finally, the lawyer may herself believe that the client's defiance story is inappropriate or offensive, and the lawyer may act based on her own moral judgment.¹³⁸

These stories do not fit within a mitigation tradition. They almost universally will not decrease a defendant's sentence. They often admit culpability and explain why the actions or conduct was justified or appropriate under the circumstances. Embracing a mitigation rationale suggests that these stories need not be heard.

Perhaps that is true. Maybe we should understand the legislative preferences for cooperative and repentant behavior as an expression of our social judgment about the dialogue that should take place at sentencing. Judges are given discretion at sentencing based on, among other things, their ability to hear individualized facts about each offender and make a determination about the appropriate penalty for each one. Further, people directly affected by the offender's conduct do not want to hear defiance stories. Perhaps these stories, however compelling or moving, should not be told.

Yet, the telling of at least a few of these stories seems *necessary*. Before being sentenced to life imprisonment, Nelson Mandela stood, dignified, before his sentencing court and elegantly stated that he did the acts for which he was convicted and was proud to have done them.¹³⁹ Mandela did not seek to mitigate his punishment or apologize for his conduct.¹⁴⁰ He also suggested an alternative vision of justice in the face of what he believed to be an unjust system.¹⁴¹ His words flew in the face of the sentencing court

136. Daniel W. Stiller, *Guideline Sentencing: Deepening the Distrust Between Federal Defendant and Federal Defender*, 11 Fed. Sent'g Rep. 304, 304 (1999) (reviewing a number of reasons for distrust between a defendant and his attorney).

137. See, e.g., Transcript of Sentencing Hearing, *supra* note 130 (transcription of sentencing hearing of the Chicago Seven defendants, in which their attorneys declined to speak, instead allowing only their clients to speak for themselves).

138. Cf. C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 Law & Soc. Inquiry 849 (2000) (discussing ethical and moral tensions between capital defense attorney and clients who express a desire to receive the death penalty).

139. See James Boyd White, *Acts of Hope: Creating Authority in Literature, Law, and Politics* 277 (1994) ("Nelson Mandela denies the authority of the sabotage law under which he is convicted, and in doing so creates another vision of the world and himself, in his own text, for which he claims an authority that will justify the acts of sabotage he admits he has committed . . ."). White reproduces the allocution from a number of sources.

140. See *id.* at 279 ("An essential part of the meaning of this speech, like the speeches of Socrates to the jury, is its refusal to seek clemency. There is no apology here in the modern sense of the term, but in an older sense the speech is indeed an apology: it is a justification of his life, an insistence on saying the truth about his motives and his methods, on this last occasion on which he could expect to speak in public in his lifetime."). White notes that Mandela's education and training allows him effectively to present this defiance story, at times assuming the persona of an objective lawyer. *Id.*

141. *Id.* at 288-94.

and questioned the legitimacy of his prosecution. It was a true defiance story. Though offensive to the sentencing court and the system that convicted him, Mandela's words and actions—including his allocution—are now held up as an example of courage. It is not just a permissible allocution; it is a heroic one. He should not have been silenced.

One objection to discussing Mandela's case is that it is atypical. Mandela was a trained attorney pursuing political goals against an oppressive government.¹⁴² What does the allocution of Nelson Mandela have to do with the often inelegant ramblings of the average defendant in the United States; someone not pursuing a political ideal; someone merely guilty of committing a criminal offense? My point in using Mandela's allocution is not to suggest that others will be as eloquent or that their goals will be as just. It is merely to point out the limits of a mitigation rationale for allocution.

This is an area where purpose matters. If allocution serves mitigation only, then stories of defiance have no place within modern practice.¹⁴³ These defendants do not have an ability to speak. If we think, as I do, that these stories—stories that might offer alternative accounts of the case or the offender, including stories of racism in the criminal justice system, economic oppression of the defendant, or other counter-hegemonic themes—have a place, then we must look beyond mitigation to understand allocution.

III. THE CASE FOR HUMANIZATION

A. *A Humanization Theory of Allocution*

If allocutions focused on mitigation can be futile, inflexible, and flawed, humanization provides an alternative perspective. Allocutions that are rooted in humanization allow for a broader scope of defendant speech, accommodate the defendant's unique perspective, and dovetail with the participatory sentencing advanced in the context of victims' rights.

1. Humanization Allows for a Broader Scope of Defendant Speech

Humanization takes the individualization of the defendant as its starting point. The allocution allows a defendant to describe who he is, how he came to this place in his life, and what he hopes for his future. Allocutions based in humanization can also focus on themes of innocence, mercy,¹⁴⁴ or

142. White notes that even in apartheid-era South Africa, where silence would likely have better served the goals of the government, Mandela was permitted to speak. *Id.* at 293.

143. Technically, Mandela's allocution could matter, as he did not know his sentence and was eligible to receive the death penalty. *See id.* at 278-79. However, mitigation of his sentence was clearly not the central purpose of his allocution.

144. *See United States v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1994) (stating allocution is meant to "temper punishment with mercy in appropriate cases, and to ensure that sentencing reflects individualized circumstances").

defiance. For the defendant, who has already been convicted, his interests may be broader than just a decreased sentence. To be sure, many, if not most, defendants will want to achieve a lesser sentence and will speak at allocution about mitigating facts. They may also, however, want to speak their mind, highlight an element of the offense or trial that appears to them as unjust, or pursue other goals unrelated to the lesser sentence. It is these ends that are allowed under a humanization rationale. In other words, humanization allows for a wider variety of stories and voices and legitimizes and values a broader range of speech.

The humanization rationale can be found in both the history of allocution and modern case law. Common law rites of allocution could be viewed as an attempt, in a highly standardized system of automatic punishment, to more closely match the culpability or character of the defendant to be sentenced. The defendant had a chance to speak to the court directly and personally offer his or her own explanation.¹⁴⁵ For example, at the point when the benefit of the clergy had widespread availability, this plea in allocution served the function of allowing the court to express mercy based on the individual circumstances of the offender or the case.¹⁴⁶ To be sure, this fit for a humanization theory is imperfect. The court had only two options: impose a capital sentence or free the defendant. Allocution pleas that did not fit into a recognized exception to imposition of the judgment largely fell on deaf ears. Yet, the common law courts persisted in allowing the defendant to speak.

In modern cases, courts that focus on the individualized presentation of the defendant tend more towards a humanization rationale for allocution. For example, in *Harris v. State*,¹⁴⁷ the Maryland Court of Appeals emphasized that the nature of allocution goes beyond mitigation.¹⁴⁸ “[T]he 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.”¹⁴⁹

145. See Wharton, *supra* note 89, at 636 (stating that “[t]he object of the address is to give the defendant the opportunity to personally lay before the court, statements which, by the strict rules of law, could not have been admitted . . . ; but which, when thus informally offered from man to man, may be used to extenuate guilt and to mitigate punishment”).

146. See 4 Blackstone, *supra* note 28, at 1034 (noting “the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.”); see also Barrett, *supra* note 22, at 120 (suggesting that common law courts had to invent ways to avoid the severe punishments of the day).

147. 509 A.2d 120 (Md. 1986) (applying the common law to uphold the right of allocution to a capital defendant).

148. *Id.* at 127.

149. *Id.*

This broader content of appropriate allocutions does not *necessarily* mean that defendants will speak more often. For example, there are many places throughout the arrest and trial that defendants and their attorneys make strategic choices not to talk, often prompted by structural and procedural factors.¹⁵⁰ But there are reasons to think it might help. For example, a defendant might care about how he ended up in this place before the court, the effect of the offense and criminal justice process on him and his perceptions of this process, and how he perceives this incident in relation to the rest of his life.¹⁵¹ These topics do not fit squarely within a mitigation tradition. With humanization, the picture that the defendant wants to present of himself is more likely within the purpose of allocution.

This broader scope of speech may have structural implications beyond simply more defendant speech. It is no secret who is not being heard under an alternate theory of allocution. The silencing of convicted defendants is, in large part, the failure to hear the stories of poor people,¹⁵² often disproportionately African American or Hispanic men.¹⁵³

Defendants, especially poor or minority defendants, might choose not to speak for many reasons. Some of these reasons would not be altered by a humanization theory of allocution. For example, defendants who do not allocute because they are afraid of public speaking, self-conscious about speaking patterns, or intimidated by the court or the sentencing process will continue to be silent. However, some defendants may not speak, or may constrain what they say, because of the content of their desired allocution. They may believe that their personal story is one that does not fit within the framework of mitigation. It is these allocutions which will be affected by adopting a humanization rationale.

2. Humanization Is Less Concerned with Objective Fact-Finding

In addition to allowing a broader range of speech, a humanization rationale places less focus on fact-finding. A humanization rationale recognizes, consistent with real-world experience, that the defendant's

150. See Natapoff, *supra* note 7, at 1458-69.

151. See *United States v. Adams*, 252 F.3d 276, 288 (3d Cir. 2001) ("[T]he District Court was 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.").

152. See Caroline Wolf Harlow, U.S. Dep't of Justice, Bureau of Justice Statistics Special Report: Defense Counsel in Criminal Cases 1 (Nov. 2000) (stating that about 66% of felony defendants in federal court had court-funded counsel at the end of their case and about 82% of felony defendants in large state courts had court-funded counsel).

153. Compare Bureau of Justice Statistics, *supra* note 2, at 454 (stating that of felony defendants in the seventy-five largest counties, 45% were Black, 23% were Hispanic, and 81% were male), and *id.* at 432 (stating that of the offenders sentenced in U.S. district court under the federal sentencing guidelines, 24.6% were Black, 41% were Hispanic, and overall, 86% were male), with U.S. Census Bureau, Overview of Race and Hispanic Origin 2000, at 3 tbl.1 (2001) (stating that 12.3% of the population is Black or African American and 12.5% of the population is Hispanic or Latino).

allocution may not be verifiably true or false.¹⁵⁴ Sometimes, the allocution consists of the offender's perspective on his life and the offense of conviction. For example, one defendant might experience his case as about overreaching police or lying complainants, while others looking at the same case do not see these themes.¹⁵⁵ Humanization allows for this subjective interpretation.¹⁵⁶

Other possible features of an allocution—such as the expression of remorse—are rarely objectively determined to be sincere or insincere; remorse or apology is not at its core a fact-finding question.¹⁵⁷ Further, defendants' stories, with high ideals of innocence, mercy, or defiance, will sometimes be untrue. The defendant will not be innocent¹⁵⁸ or, to some, worthy of mercy. Some judges may assume—correctly or not—that the defendant's tale is a falsehood or an excuse. A theory of allocution should at least consider these possibilities. Humanization does this by focusing on the expression of the individual and putting less emphasis on determining the truth or falsehood of a defendant's statement. This is consistent with the difficulty of determining the "objective truth" of some possible allocutions. Further, it is consistent with the practice of allocution that requires the sentencer to hear out the defendant, but does not usually *require* the sentencer to lessen the punishment based on the statements at allocution, even if the defendant speaks about mitigating facts.

Some might view this decreased focus on fact-finding as a detrimental feature. The sentencing hearing certainly can be viewed—and is viewed—as an adversarial, fact-finding proceeding: The defense presents information favorable to the defendant; the prosecutor presents information unfavorable to the defendant; and the judge decides. Mitigation, arguably, fits better into this adversarial model. A mitigation rationale suggests that the judge can discover a discrete set of facts told by the defendant that can lessen the sentence given. However, this fact-finding function of the

154. See *Bullington v. Missouri*, 451 U.S. 430, 450 (1981) (Powell, J., dissenting) ("Underlying the question of guilt or innocence is an objective truth The sentencer's function is not to discover a fact, but to mete out just deserts as he sees them.").

155. Cf. *Coleman v. Thompson*, 501 U.S. 722 (1991). In *Coleman*, each opinion viewed the case to be decided in a different way, with a different story and themes. Justice Sandra Day O'Connor, writing for the majority, characterized the case as one about federalism. See *id.* at 726. Justice Byron White, concurring, focused on the procedural posture of the case. *Id.* at 757-58 (White, J., concurring). Finally, Justice Harry Blackmun, in dissent, focused on a story about liberty and fairness. *Id.* at 762 (Blackmun, J., dissenting).

156. See ABA Standards for Criminal Justice: Sentencing 18-5.17 cmt. at 208 (3d ed. 1994) ("The policy behind the right of allocution has more to do with maximizing the perceived equity of the process than with conveying information on which courts may rely in making findings of fact.").

157. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 Yale L.J. 85, 143 (2004) (asserting that defendants may disingenuously state that they are remorseful, but suggesting that some benefit derives from this false statement of remorse anyway).

158. Maria Glod & Michael D. Shear, *DNA Tests Confirm Guilt of Man Executed by Va.*, Wash. Post, Jan. 13, 2006, at A1 (reporting on executed convict who maintained his innocence, but DNA tests performed after his death "confirmed [his] guilt").

sentencing hearing is adequately served by the adversarial roles of the defense attorney and the prosecutor. To the extent that the sentencing hearing requires a distillation of facts, this can be done sufficiently through the attorneys' presentations; the allocution can be considered outside of this context.

3. Humanization Is Consistent with Participatory Arguments of Victims' Rights Advocates

The victims' rights community already has recognized the sentencing hearing as a key locus of storytelling in the criminal justice system,¹⁵⁹ especially through the codification and use of victim impact statements.¹⁶⁰

The desire of victims' rights advocates to have victims speak at sentencing does not focus on the aggravation of the defendant's sentence,¹⁶¹ although, in some cases, the sentence may, in fact, be aggravated.¹⁶² Instead, most of the arguments for victim impact statements focus on participation in the process and validation of the individual person, not on

159. By including these arguments, I do not mean to suggest that they are correct; only that, to the extent they dominate our discussion of sentencing, a rationale based in humanization is more consistent with these arguments. There is no causality. Someone might support a humanization rationale for allocution, yet believe that the same justifications for this do not apply to victim testimony at sentencing. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361 (1996). Bandes argues that the use of narrative has been promoted to give voice to "outsider" voices and that despite the strong pull of narrative, victim impact narratives "should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing," thereby risking the "sentencer's ability to perceive the essential humanity of the defendant" and can risk offending the dignity of the victim as well. *Id.* at 365-66. To the extent that victims' rights advocates have captured the public or have an intuitive emotional appeal, they have done so with this appeal to the "individual victim" and the importance of a particular life. Victim statements have also been criticized as potentially detrimental to the victims themselves. See Martha Minow, *Surviving Victim Talk*, 40 UCLA L. Rev. 1411, 1429 (1993) ("Victim talk can have a kind of self-fulfilling quality, discouraging people who are victimized from developing their own strengths or working to resist the limitations they encounter.").

160. See Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 Notre Dame L. Rev. 39, 60 n.117 (2001) (listing statutes requiring live victim impact testimony); Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, 299-305 (2003) (listing state statutory and constitutional provisions regarding victim sentencing testimony); see also Federal Crime Victims' Rights Act, 18 U.S.C. § 3771 (2000).

161. See Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 Utah L. Rev. 479, 497 ("This multiplicity of reasons explains why victims and surviving family members want so desperately to participate in sentencing hearings, even though their participation may not necessarily change the outcome."). But see Bandes, *supra* note 159, at 395 (stating that victim impact statements evoke "a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger"); Barnard, *supra* note 160, at 56 (stating that victim impact statements are "obsessive, vindictive, and frankly unappealing").

162. See Cassell, *supra* note 161, at 485-86 (stating that a frequent criticism of victim impact testimony is that it will harm defendants' rights and arguing that studies show that the actual impact is not that significant).

the effect on the sentence.¹⁶³ One of the reoccurring rationales for victim impact statements and protection of other forms of victim speech or participation is the emphasis on making the victim “real,” instead of a faceless, silent abstraction.¹⁶⁴

Advocates of victim impact statements also point to other, related effects. The ability to speak has a cathartic effect.¹⁶⁵ Additionally, the ability to be heard in open court about the offense and its impact is seen as part of a just process.¹⁶⁶ For others, victim statements at sentencing serve a denouncement function—these statements allow for direct moral condemnation of the defendant.¹⁶⁷ Finally, some have suggested that the strong protection of victim impact statements will serve to disproportionately benefit poor victims or victims of color that are more likely to be shut out of the current process.¹⁶⁸ In many ways, these arguments mirror those made in favor of humanization of defendants.¹⁶⁹

To be sure, some supporters of victim impact statements perceive that defendants already have a complete opportunity to be heard, and that they are merely pushing for equal treatment. An argument for victim participation at sentencing is that victims are not seeking any “special” or additional rights for victims; they are seeking for victims to be more equal to the defendant.¹⁷⁰ However, they assert that the victim’s ability to speak serves additional functions. Whether or not you agree with these other uses of the sentencing hearing,¹⁷¹ victims’ rights advocates recognize that the purpose of speaking at sentencing goes beyond aggravation and mitigation.

In sum, humanization theory allows for a broader range of speech to be heard at allocution. Further, as compared to a mitigation rationale, a humanization rationale de-emphasizes the fact-finding nature of allocution.

163. See Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289, 293; see also *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1016-17 (9th Cir. 2006) (stating that the statutory aims of the Crime Victims’ Rights Act include having the court and defendant hear about the human cost of the offense and allowing the victim to regain dignity by the process).

164. See *Payne v. Tennessee*, 501 U.S. 808, 823-24 (1991).

165. See, e.g., Robert P. Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules*, 88 Cornell L. Rev. 543, 548-49 (2003) (noting that catharsis may be a powerful motivation behind victim impact statements); Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 Fordham Urb. L.J. 439, 451 (1993) (stating that “[v]ictim impact statements empower the victim”).

166. Cassell, *supra* note 161, at 494 (“Given that our current system allows almost unlimited mitigation evidence on the part of the defendant, an argument for equal justice requires, if anything, that victim statements be allowed.”).

167. Barnard, *supra* note 160, at 79-80.

168. See Cassell, *supra* note 161, at 513.

169. Cf. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911 (2006) (arguing that victims and the public are outsiders to the criminal process and suggesting that victims be given larger roles to bridge the “gulf” between them and insiders to the criminal process).

170. See *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1016 (9th Cir. 2006).

171. See Bandes, *supra* note 159, at 365-66 (stating that victim impact statements “appeal to hatred, the desire for undifferentated vengeance, and even bigotry” and “may block the sentencer’s ability to perceive the essential humanity of the defendant”).

Finally, basing a defendant's allocution in humanization is consistent with the arguments for victim impact testimony that have been made in the recent past to increase the victim's participation at sentencing.

B. *Benefits of Grounding Allocution in a Theory of Humanization*

Basing allocution in a humanization rationale has benefits for both the defendant and other actors in the criminal justice system. First, I focus on some of the possible benefits to the offender. Then, I examine a few possible advantages for the court, the structure and integrity of the sentencing process, and the public. While mitigation has support and intuitive appeal, the benefits of grounding allocution in humanization, I believe, outweigh the costs.

1. Benefits to the Defendant

As allocution is, at its core, a statement by the defendant, I focus first on some potential benefits for the defendant of an allocution practice based in humanization. There are at least four advantages. First, the defendant will be more likely to be an actor in his own case. Second, the defendant can be seen, through allocution, as a participant in public life, through his active participation in the criminal justice system. Third, through a humanization allocution, a defendant can create and express himself. Fourth, by opening up the scope of possible allocutions, perhaps the defendant will be more likely to explicitly choose when to remain silent, instead of seeing silence as the default.

a. *Actor in His Own Case*

The mere act of talking, no matter what the content, emphasizes the defendant's humanity.¹⁷² In front of the court is not only "the defendant" in the orange jumpsuit, convicted of the statutory offense, but also a person who can speak and represent himself to the court.¹⁷³ Often, a defendant will express a desire to represent himself, trying to fire his court-appointed attorney because he believes that the attorney is not representing him in a way that reflects his wishes or his perceptions of the case.¹⁷⁴ The

172. See *Shelton v. State*, 744 A.2d 465, 492 (Del. 2000).

173. Cf. Doyle, *supra* note 18 (discussing the attorney's ability to re-present defendants (my emphasis)); see also Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 Mich. L. Rev. 2459 (1989) (discussing lawyers' representation of clients). At allocution, the defendant can *present* himself as he chooses.

174. See Erica J. Hashimoto, *Defending the Right to Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423, 460-76 (2006) (finding that pro se defendants chose to represent themselves largely because they were dissatisfied with their court-appointed counsel or wanted to take an ideological position or approach that their attorney did not); see also Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 Law & Soc'y Rev. 483 (1988). Casper's study, which assessed "litigant satisfaction" of a group of convicted felons, found that procedural justice, independent of the outcome, was important to defendants. For example, one factor that mattered to defendants was the

defendant, by being able to allocute can, at least at this stage, "have his say." He can counter the passive role cast for him up to this point under a plea bargaining reality. He can participate in his own case in some way, and, because of the scope of legitimate statements under a humanization theory, may be more likely to do so.

b. *Participation in Public Life*

The benefit of allocution could extend beyond the defendant's satisfaction at being able to be an actor in his own case. Through a humanization allocution the defendant is a participant in the public institution of the criminal justice system that directly affects his life.

The use of stories—told in the first person—to give a voice to persons within the legal system, particularly those who are marginalized from traditional legal discourse, is nothing new.¹⁷⁵ Allocution is a particularly suitable place to import these ideals into the criminal justice process. The stories that could be told—including tales about discrimination, police oppression, desperation, economic necessity—may never fit into the confines of "mitigation," yet they remain relevant to punishment and important to the offender. Further, the content of the speech that conforms to a humanization rationale is more likely to comport with the desired message of someone who might not otherwise speak. A defendant may choose not to express himself, but should not, at the final moment of judgment, have to fit within a narrow category of appropriate testimony.

c. *Self-creation and Self-expression*

At their best, allocution stories based in humanization have transformative potential for the defendant. Persons, through the telling of a life story or highlighting of a life event, help define themselves and their history.¹⁷⁶ A defendant could choose to speak and to have more control

amount of time their attorneys spent talking to them, a result that the authors concluded was "consistent with the notion that procedural justice comes in part from a sense of having a voice in the process." *Id.* at 498. It also reviews prior literature, drawn from different study groups, that emphasized the importance of being heard and "voice" in a litigant's satisfaction. *See id.* at 495-96; *see also* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684, 697 (1985) ("On the rhetorical view of law suggested here, you are entitled to have your story told in your own language (or translated into it), or the law is failing.").

175. *See* Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 Geo. J. Legal Ethics 1, 1-2 (2000) (noting the popularity of narrative theory and storytelling and tracing these back to the legal realists). *See generally* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1989) (discussing "outgroup" stories).

176. *See, e.g.,* Karen Hirsch, *From Colonization to Civil Rights: People with Disabilities and Gainful Employment*, in *Employment, Disability, and the Americans with Disabilities Act* 412, 428 (Peter David Blanck ed., 2000) (writing, in examining oral histories and narratives in disability law, that "[s]elf-defining narratives are . . . important tools in the

over how this important story in his life is framed. This selection of frame not only helps the defendant to define who he is for the court, but is also a means of self-creation. He can choose to represent himself at allocution in a way that defines his life as a failure; he could choose to tell a story of hope; he could choose to tell a story of innocence; or innocence lost. Each of these narratives told at allocution can help create or recreate the defendant's image of himself.¹⁷⁷ In the limited time that the defendant has to present his entire person, what is important? The defendant is forced to think about the key moments in his life and to choose how to present himself.

The story told is not transient. This self-created version of who the defendant is, or wants to be, will be memorialized and transcribed with the rest of the sentencing transcript. The transcript from the sentencing hearing will accompany the defendant on appeal. It will often be presented at any later parole board hearing,¹⁷⁸ where it may be used to determine whether the defendant merits release. The retelling of this story contributes to the definition of the defendant.

d. *Choice of Silence*

For now, defendants are choosing not to speak. If courts assume a mitigation rationale, they will assume that the defendant's failure to allocute means that the defendant has nothing to say to mitigate his sentence. Under a humanization rationale, defendants could choose to represent their sentencing stories in a less constrained way. They could also choose not to speak, even with this broader array of permissible speech. Perhaps this choice would be a more deliberate one.

2. Benefits for the Court, the Structure and Integrity of the Sentencing Process, and the Public

While the focus of sentencing allocution is on the defendant, allocution theory should also take account of the effect on the court and the criminal justice system. It should also consider whether a humanization approach to allocution is consistent with other aspects of the sentencing process and its outcome. Specifically, I argue that a theory of allocution based in humanization could have benefits for the court, the accuracy of the sentence given, the legitimacy of the sentencing process, and the public.

process of political empowerment and in the effort to redefine the cultural meaning of disability").

177. *Cf. id.*; see also Michael P. Nichols, *The Essentials of Family Therapy* 249-61 (2d ed. 2005) (giving a basic description of narrative therapy). Nichols notes that narrative therapy uses the fact that "[s]tories don't just mirror life, they shape it. That's why people have the interesting habit of becoming the stories they tell about their experience." *Id.* at 250.

178. See, e.g., 61 Pa. Stat. Ann. § 331.19 (West 1999) (stating that, among other things, the parole board "shall . . . consider the notes of testimony of the sentencing hearing").

a. *Court*

The harms of silence extend beyond the impact on the defendant. Without the voices of the defendants, the court risks assuming that the defendants before it are alike despite actual significant differences.¹⁷⁹ The court risks never hearing about the implications of its decisions or other stories—such as racial dimensions to the case or the proportionality of punishment—that might not be relevant at other parts of the trial.¹⁸⁰

A humanization rationale attempts, as the name describes, to value the individualization of the defendant. The court seeks to allow expression of each defendant's humanity, and seeks to understand, over time, the variety of defendants and their lives.¹⁸¹ Having this information could allow judges and other actors in the criminal justice system to develop a more nuanced portrait of defendants.¹⁸² By doing so, these officials may, for example, be better able to develop creative solutions to criminal justice problems or to observe trends in offender characteristics or behavior.

This rationale for allocution also indirectly reaffirms the humanity of the court and comports with current shifts in sentencing practice away from the judge as fact-finder within a constrained guideline system and towards judicial sentencing discretion.¹⁸³ The sentencer can find mitigating facts,

179. See *United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991) (“[T]he 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 appearance of dispensing assembly-line justice.”).

180. See, e.g., *McKinney v. Delaware*, No. CIV.A. 97-340, 2000 WL 1728276, at *7 (D. Del. May 3, 2000) (reporting a portion of the allocution in which the defendant, among other things, indicated that he felt “railroaded” by the imposition of a life imprisonment sentence as a habitual offender). The defendant, McKinney, continued,

Two of my burglaries, [the] people owed me money. I went and took things from them because they were there, and then they turn around and put charges on me just because I live by the code of the street I dealt with things my way I admit . . . when I’m eating barbituates and drinking, I have blackouts and I have done things. The last burglary I’m sorry for, you know, because I was in a blackout. But the other burglaries, people owed me money, and it was over drugs

. . . .
But . . . you know, that’s neither here nor there. But I’m saying I don’t feel, Your Honor, I don’t feel [that] I deserve a life sentence. I see child molesters . . . getting less time.

Id. at *8 (alterations in original).

181. See, e.g., *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) (“[D]uring the sentencing phase of the proceedings . . . the sentencer must attempt to know the heart and the mind of the offender and judge his character . . .”).

182. Cf. *Sarat*, *supra* note 70, at 364 (stating that the work of death penalty defense attorneys “is increasingly the work of recording the stories of their clients’ lives, of the poverty and abuse which breeds violence, and of the unresponsiveness of a legal order intent on doing its own kind of violence. As the prospect of saving lives diminishes, the importance of saving the stories of those whose lives are lost increases in importance.”).

183. See *supra* notes 75-85 and accompanying text. The Court’s holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), did not

presented by the defendant through allocution, to decrease the defendant's sentence. However, the humanization rationale is equally consistent with the sentencer's duties, and perhaps more appropriate, given the increased discretion of sentencing courts. The court can strive to develop a fine-grained portrait of the defendant through the allocution to help it exercise this discretion. The judge is not merely the bureaucratic clerk of automatic guideline systems.¹⁸⁴ She is also the receptor of an individual's allocution story; a role that requires empathy, patience, and judgment.¹⁸⁵

b. *Accurate and Appropriate Sentence Given*

While the process of sentencing is important, most view sentencing as a means to an end. The hearing should result in the imposition of an accurate and appropriate sentence.¹⁸⁶ Allocutions based in humanization would not, I argue, produce sentencing outcomes that are less accurate or otherwise inferior to sentences produced under a mitigation rationale.

One accepted measure of an appropriate sentence is whether it is tailored to fit both the crime and the person who committed it. Mitigation achieves this fit by the discussion of facts, including guideline factors, that give more specificity about the offense and offender. Allocutions based in humanization also aim to give the sentencer information about the offense and offender, but the focus and the scope of the information presented is shifted.¹⁸⁷ The humanization rationale recognizes that individuals differ

remove fact-finding from the trial court's purview, but did constrain a court's ability to find facts that will increase the statutory maximum sentence.

184. See Tonry, *supra* note 75, at 48-49 ("[T]he Guidelines were too mechanical. With forty-three levels of offense severity set out in a grid format like a road-mileage chart, and innumerable factors warranting shifts up or down the grid, calculating a sentence resembled scoring a loan application, and that did not feel to judges or most anyone else like a deliberative process.").

185. For an example of a case in which, on the appellate record, the trial court seems to ignore these requirements in the hearing of a defendant's allocution, see *United States v. Li*, 115 F.3d 125, 131-32 (2d Cir. 1997). The court found that the defendant's allocution was sufficiently limited to require resentencing where the trial court, after listening to a non-native English speaker's allocution for a "few minutes," stated "I am not going to sit here and listen to the entire trial. You have three minutes to finish up." *Id.* A few minutes later, the court ordered the defendant from the room because she reacted emotionally to the court's termination of her allocution. See *id.* at 132.

186. This statement does not explicitly address the many, and sometimes competing, goals of criminal punishment. It only recognizes that imposition of an "appropriate" punishment—whether defined by the just deserts of the offender, the deterrent value to others, or other criteria—is a primary goal of the criminal sentencing hearing. To the extent that I give priority to any particular theory of punishment, my emphasis on the individuality of the defendant devalues general deterrence and other theories that do not necessarily link the appropriateness of the sentenced imposed on the offender to the severity of the offense and the person who committed the offense.

187. See *United States v. Myers*, 150 F.3d 459, 462 (5th Cir. 1998) (contrasting the defendant's ability to discuss whether a factual basis existed for a firearm enhancement with the "broad-ranging opportunity to speak embodied" in the federal allocution rule); cf. Haney, *supra* note 15, at 1457 ("If nothing else, a judge's capital-sentencing instructions should clearly frame the broadened scope of the penalty phase inquiry so that capital jurors

beyond the specific facts of the offense and the defendant's prior history of criminal activity. Allocution based in humanization more clearly allows for consideration of the defendant's entire life and his own perspectives on the offense. Humanization also acknowledges that sometimes punishment will have a different effect on different people, even if they have similar crimes and records. Humanization does not require the court to act upon these differences;¹⁸⁸ it does, however, allow the judge to attempt to understand these differences, and the opportunity to act on them.

Shaming-type punishments are one specific example of how a court might impose, after allocution, a punishment that better fits the offender. Shaming punishments may be on the rise or may be seen as an increasingly viable alternative to incarceration.¹⁸⁹ However, they have been criticized for their lack of consideration of the effect on the defendant's mental health or well-being¹⁹⁰ and the difficulty of tailoring an appropriate shaming punishment for a defendant.¹⁹¹ Defense counsel is one source of information about the possible impact of a shaming punishment on the defendant. An allocution based in humanization could also give the court more insight into the person to be sentenced and the appropriateness of a shaming punishment. The court, faced with a thorough allocution that humanizes the defendant, could be more certain that punishment involving public moral condemnation¹⁹² or embarrassment would be acceptable to the

understand that the defendant's entire life lies at the heart of their sentencing decision. . . . The seemingly inexorable (and perhaps unintended) narrowing of relevant considerations to the circumstances of the crime and little else likely stems from the relative ease with which legislative judgments and jury decision making can be precisely focused on crime characteristics, as compared to the more difficult, elusive, and ultimately discretionary inquiry into the moral nature and essential worth of the person whose life stands in the balance." (internal quotation marks omitted).

188. The court might determine, for example, that the harsher effect of incarceration on a wealthy offender than on a poor offender is not a legitimate ground for sentencing the wealthy offender less severely.

189. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 635 (1996) (noting the increased popularity of shaming penalties, in part because they offer a less expensive alternative to incarceration).

190. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1920 (1991) ("A final implication of the psychological aspects of shame, which raises both practical and fairness concerns, is the nature of the wound that shaming seeks to inflict. When it works, it redefines a person in a negative, often irreversible, way. Effective shame sanctions strike at an offender's psychological core.").

191. See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733, 748 (1998) ("If the retributive 'bite' of shaming penalties comes from getting the offender actually to *experience* the adverse and unpleasant emotion of shame, judges will have a tough time figuring out just which offenders will have that experience (and how much they will suffer as a result) and which will not. And they will at least sometimes get it wrong if they try.").

192. See Kahan, *supra* note 189, at 646-48.

defendant¹⁹³ or that a shaming punishment is not appropriate given its implications.¹⁹⁴

c. *Legitimacy of Process and Outcome*

Allowing a convicted defendant to individually "have his say" recognizes the seriousness of the sentence to be imposed and the necessity that it be viewed as a legitimate expression of state authority. By viewing allocution as merely mitigation, instead of also allowing for a personal expression by the defendant, we risk undermining the perceived sense of equity¹⁹⁵ and, perhaps, respect for the rule of law. While the justness of a sentence can be viewed from a number of perspectives, the fair consideration of the individual before the court is, all else being equal, more likely to lend legitimacy to the sentence that is given.¹⁹⁶

Further, allocution is the one place in the criminal process where explicit criticism of the system that gave rise to the conviction is possible.¹⁹⁷ Incorporating into allocution the humanization stories that engage in this criticism strengthens the system imposing the sentence and gives more credibility to the punishment meted out without disrupting the traditional constraints of relevant testimony at trial or discouraging the admittedly efficient prevalence of guilty pleas.

d. *Public*

Allocution, while a public event, has not been emphasized as a procedure having a significant public function. In modern sentencing, even if the focus is on the defendant and the accuracy of his sentence, the transparency of the process and the popular attention to criminal proceedings suggest that the effect on the public should, at a minimum, be considered. To the extent that the sentencing hearing is a public expression of the consequences of the

193. See *id.* at 642-46 (noting that the alternative to shaming is often incarceration, that imprisonment can be much more difficult, and that some offenders would choose a shaming punishment over imprisonment).

194. Massaro, *supra* note 190, at 1918 ("The signal insight from the psychological studies of shame is that the experience is personal. People are reared differently and exposed to different peer relationships and other personality shaping influences; as such, they experience shame differently.").

195. *United States v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1994) ("[A]llocution has value in terms of maximizing the perceived equity of the [sentencing] process." (internal quotation marks omitted)).

196. *Shelton v. State*, 744 A.2d 465, 492 (Del. 2000) ("Put another way, allocution is necessary because it affords an opportunity for the jury to learn about the whole person and it bespeaks our common humanity that a defendant not be sentenced to death by a jury which has never heard the sound of his voice." (internal quotation marks omitted)); see also *United States v. Adams*, 252 F.3d 276, 288 (3d Cir. 2001) (stating that allocution "helps assure the fairness, and hence legitimacy, of the sentencing process"); Nussbaum, *supra* note 114, at 160 ("Any fully adequate moral or legal judgment must be built upon a full grasp of all the particular circumstances of the situation, including the motives and intentions of the agent.").

197. See, e.g., Transcript of Sentencing Hearing, *supra* note 130.

offense and the sentence, allocution under a humanization theory fulfills this goal. It allows the public to hear about the person who committed the offense. Further, the substance of a defendant's humanization allocution might serve other important public goals. For example, the public might hear about the effect of punishment on the offender and his family. In addition, the offender might choose to apologize or otherwise express remorse or regret for his actions, allocutions that the public, in whose name the prosecution occurs, may want to hear. Further, to the extent that allocutions of innocence or defiance take place, these are relevant to the public discourse on the functioning of the criminal justice system and examination of any errors that might occur.

In sum, beyond bringing coherence to our thinking about allocution, viewing allocution's purpose as humanization improves the sentencing process and outcome. Among other things, it encourages the defendant to be a full and active participant in his case and the criminal justice system, in part, by choosing how to present himself to the court. It emphasizes the accuracy and individuality of the sentence to be imposed by the court.

IV. RISKS OF GROUNDING ALLOCUTION IN A THEORY OF HUMANIZATION AND THE EFFECT OF RETHINKING THE THEORY OF ALLOCUTION

In this part, I discuss some of the implications of a humanization rationale for allocution. First, I raise and respond to a few of the possible criticisms of a humanization rationale, namely the possibility that it is inefficient and that it has the potential to increase disparities in sentencing based on race or other disfavored factors. Next, I examine a few concrete implications of a humanization theory of allocution, specifically the effect on harmless error review of a denial of allocution and on the duties of defense counsel.

A. Criticisms of a Humanization Model

Humanization is not perfect. Despite its significant benefits, mitigation can more easily be defined and can better focus what can be said at sentencing. Allocutions in humanization could expand the time spent on allocution, slowing down the sentencing process. Additionally, to the extent that an allocution based in humanization allows a more individualized assessment of the offender, it makes possible distinctions between offenders based on income, race, or other factors that may be normatively undesirable.

1. Humanization Is Inefficient

One obvious concern of emphasizing a humanization rationale is a potential loss of judicial efficiency. As discussed above, humanization broadens a defendant's allocution. This broader scope might imply that more defendants will choose to allocute or those who do will speak longer and more in-depth about themselves. First, to the extent that this is true, it

is a trade-off for the benefits of the rationale.¹⁹⁸ Any added time spent listening to a defendant during his sentencing hearing is, I argue, worth it.¹⁹⁹ Second, the criticism is not strong assuming current plea and sentencing practices, which I take as given. The humanization rationale for allocution *assumes* that current rates of guilty pleas will continue—it is a way to address the loss of defendant voice within the current system. I take this often-maligned practice as a given and thus work within a system that recognizes efficiency concerns. Further, judges can and do place practical constraints on allocution. For example, judges can limit the length of allocution by balancing the seriousness of the offense and the sentence to be imposed, the court's docket, and other concerns. The court could also limit unduly repetitive statements or threats, for example. The statutory protections for allocution—while generally allowing humanization—also set an outer boundary for relevance. This could mean that the allocution should relate to the case, the defendant, or the courts generally. These existing limitations provide some basic contours for the length and scope of allocution that would not be significantly altered by viewing humanization as the goal of allocution.

2. Humanization Allows for an Increase in Racial, Class, and Other Disparities

If the stories told by defendants at allocution are consistent with negative stereotypes and generalizations, allocutions risk validating these opinions and increasing racial and class disparities. For example, the sentencer might use the ability to confer mercy to impose punishments that discriminate based on race, gender, or class. This criticism highlights a broader tension between discretionary systems and those in which discretion is tightly cabined.²⁰⁰ In the context of allocution, stories told by low-income defendants or people of color at a time that they are found guilty of a criminal offense may reinforce stereotypes of poor people and others. The sentencing story can be the client's life story. But his story is being told at a time which may define his greatest failure or mistake. Further, the lawyer may encourage the defendant to allocute with an "acceptable," tried-and-true sentencing story in order to help mitigate the defendant's sentence. This story may portray the defendant in a stereotypical way, or may reinforce the defendant's lack of power and influence in his own life.

198. See *supra* Part III.B.1.

199. See *United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991) ("The right of allocution is minimally invasive of the sentencing proceeding; the requirement of providing the defendant a few moments of court time is slight.").

200. See, e.g., Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 *Stan. L. Rev.* 85, 95-106 (2005) (stating that the federal sentencing guidelines were developed to limit discretion that was exercised based on judicial personality, geography, and the offender's race, class and gender, but ultimately concluding that these aspirations were not attained).

The converse also may be true. A more articulate, more educated, or wealthier defendant may use the broad scope of allocution to his advantage. He may better be able to portray himself to the sentencing judge and may use language that is familiar and comfortable to the court. The extent to which this criticism undermines the potential benefits of a humanization allocution is uncertain. Allocution is only one component of the entire sentencing process. Other procedural protections—the advocacy of counsel, or constitutional limitations²⁰¹—may help to constrain the sentencer's choice of sentence. To the extent these procedural protections do allow discrimination, a sentencer can take cues from racial, class, gender, or ethnic stereotypes if she is inclined to do so. This is true regardless of the text of the defendant's allocution. As with any sentence that allows discretion, the hope is that the sentencer can state reasons for her decision, and, if necessary, the sentence can be reviewed on appeal. If the defendant fully allocutes, the factors the sentencer may have considered—whether helpful or harmful to the defendant—will be out in the open and subject to scrutiny. In the end, the potential richness of an allocution based in humanization may best ensure against discrimination. If a more complete version of the defendant is portrayed, the sentencer may be more likely to move beyond unfounded stereotypes and presentence report summaries.

B. Implications of Focusing Allocution on Humanization

While adopting a humanization rationale for allocution would, on balance, benefit both the defendant and the criminal justice system, and help bring coherence to a hodgepodge of history and case law, it would have at least a few practical implications. Here, I briefly explore two of these—the effect of adopting a humanization rationale on the harmless error review and the role of defense counsel with respect to allocution.

1. Harmless Error Review

A humanization rationale would eliminate harmless error review of a trial court's failure to allow allocution. First, let me state what I do not mean. Harmless error review would not disappear because of the nature of the constitutional violation²⁰² or the obviousness of prejudice to the defendant.²⁰³ Instead, harmless error should not apply because it is incompatible with the purpose of allocution. When applying harmless error, appellate courts determine whether the mistakes in the trial court

201. See, e.g., *Blakely v. Washington*, 542 U.S. 296 (2004).

202. See *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) ("Some constitutional violations . . . by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless.").

203. See, e.g., *United States v. Olano*, 507 U.S. 725 (1993).

affected the outcome.²⁰⁴ Mistakes that would have no impact on the outcome—usually the determination of guilt—are harmless and are not worthy of reversal. A mitigation theory allows the denial of allocution to be analyzed under this framework. If the trial court denied or refused the opportunity for allocution, appellate courts would review whether there is any evidence in the record that indicates the defendant would have spoken and, if so, whether he would have said anything that mattered to the sentence given. Because of the difficulty of making a record of what the defendant would have said and showing what the judge would have taken into account, under this view, most denials of allocution will be harmless. On the other hand, allocution under a humanization theory does not fit the harmless error framework. The purpose of allocution is not necessarily to affect the sentence given—although it will often have that consequence. Allocution allows the defendant, through the very act of speaking and through his words, to present himself to the court. If he chooses to waive or curtail this right, that is his choice. But the denial of allocution by the trial court is a denial of the defendant's ability to present himself—a denial that cannot be harmless.²⁰⁵

2. Role of Defense Counsel

Allocution should be viewed through a humanization lens that allows for a variety of defendant stories. The stories that are told will have real life consequences for defendants, because sentencing hearings have real consequences, especially now with the demise of strict guideline structures.²⁰⁶ The humanization stories told by a defendant at allocution could serve to lessen his sentence, by persuading the sentencer that an appropriate punishment is less than what others might receive. On the other

204. See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (requiring courts to examine “whether the . . . error ‘had substantial and injurious effect or influence in determining the jury’s verdict’” (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))). See generally Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 Nw. U. L. Rev. 1053 (2005).

205. Cf. *Kenna v. U.S. Dist. Court*, 435 F.3d 1011 (9th Cir. 2006) (determining, under the Crime Victims’ Rights Act (CVRA), that the remedy for failing to allow a victim to allocute may be for the district court to hold a new sentencing hearing for the defendant in which the victim is given the opportunity to speak). In *Kenna*, the testimony of the victim was before the court in another case; the district court merely refused to allow the victim to testify again. *Id.* at 1013, 1016. The Ninth Circuit noted that “[t]he court can’t deny the defendant allocution because it thinks ‘[t]here just isn’t anything else that could possibly be said.’” *Id.* at 1016 (second alteration in original) (quoting the district court). It similarly protected victims’ statements under the CVRA, even if the victim testified at another hearing. “Victims now have an indefeasible right to speak, similar to that of the defendant, and for good reason . . .” *Id.* The *Kenna* court suggested that the CVRA protects the victim’s in-court statement, whether or not it gives additional information to the sentencing court or has any influence on the sentence given. In essence, there can be no “harmless” denial of victims’ statements. To the extent that the *Kenna* court’s reasoning is adopted by other courts, defendants deserve no less.

206. See *supra* notes 75-85 and accompanying text.

hand, some allocution stories pose the risk of increased punishment.²⁰⁷ I have also noted that defense counsel can present evidence and argument on the defendant's behalf; however, I have insisted that the defendant's voice is the appropriate one for the telling of these allocution stories. An implicit assumption, so far, is that the defendant is deciding which of the faces of himself to present at allocution based on an understanding of the possible effects on the sentence to be given. In order for this to be a tenable assumption, defense counsel has an additional role to play. Part of the attorney's sentencing representation will be to communicate with the defendant about his ability to allocute, to discuss the allocution stories that the defendant believes are important, and to counsel the defendant about the possible sentencing consequences of these presentations. Nothing in this counseling role is novel or foreign to defense counsel; but without this advice, the defendant's choice about the story he wants to tell is uninformed at best and illusory at worst.

CONCLUSION

Allocution is currently a mechanistic practice with little coherent meaning. However, the history of allocution and the problems facing modern courts suggest that a better understanding of the practice is necessary. In this Article, I have examined two possible ways of approaching allocution at sentencing: mitigation and humanization. As a practical matter, most defendants will choose to present an allocution that attempts to lessen their sentences. It will often be a defendant's best strategic choice to tell allocution stories of mitigation. However, the fact that the defendant will often use his allocution to tell a story of redemption, or of remorse, or of diminished role or capacity, is not a reason to define the practice by these choices. Modern allocution practice should be given coherence by a theory that accounts for the entire range of stories told by defendants prior to the imposition of their sentence and allows for broader defendant participation. Unlike allocutions confined to mitigation, humanization allocutions can do this. Allocution stories based on a theory of humanization give defendants a point in the process to be heard and give life to a historic practice.

207. See, e.g., *supra* notes 126-43 and accompanying text.

Notes & Observations