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

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Equal Rights for Equal Rites?:
Victim Allocution, Defendant Allocution,
and the Crime Victims’ Rights Act

Mary Margaret Giannini*

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

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

Introduction

Most of us feel honored when we are asked for our opinions on a matter or are asked to tell our story. Even for an individual who may be shy about speaking publicly, knowing that others care enough to ask about her thoughts is en-

¹ Green v. United States, 365 U.S. 301, 304 (1961). For the sake of linguistic ease and efficiency, and unless discussion of a particular case requires otherwise, I will use masculine pronouns and adjectives to describe defendants, as the majority of defendants are male. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 419 (2003), available at http://www.albany.edu/sourcebook/index.html (noting that 85.3% of all convicted federal defendants in 2001 were male). When discussing victims, I will alternate my use of feminine and masculine pronouns.

noble. The same is true when she has the opportunity to stand before a court of law and present her views. Being afforded the right to participate in the solemn rite of a trial signals to the speaker that what she has to say is valued. She has been called to participate in one of the weightiest of our community rituals because her presence and observations are deemed an important part of the legal process. The speaker’s views may not prevail, but her insights, experiences, and contributions are nonetheless acknowledged and validated by the mere fact that she was heard in an official forum.

An individual’s right to address the court also directly contributes to the perceived legitimacy of the criminal justice system. We claim our criminal processes are fair because they are open, public, and seek to ensure that all relevant voices are heard prior to the court’s pronouncement of innocence, guilt, or punishment. Being heard in a court of law, therefore, is intrinsically linked to notions of due process. From this reasoning, victims’ rights advocates have argued that the right to be heard, which is granted to the defendant and government during criminal proceedings, should also be granted to victims.

Proponents of victims’ rights claim that over the course of our nation’s history, the scales of justice lost their balance, tipping out of proportion in favor of defendants and to the detriment of victims. The fair treatment of defendants throughout the legal process was viewed as paramount, while victims became “‘faceless stranger[s]’” expected to “behave like good Victorian children—seen but not heard.” The victim—who has a substantial personal interest in the trial second only, perhaps, to the defendant—was sidelined and excluded. Over the last twenty to thirty years, victims’ rights advocates have sought to change this status quo.

Promoting balanced participation between victims and defendants in the criminal justice system, victims’ rights advocates often quote Justice Cardozo’s statement that “justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.” Building upon Justice Cardozo’s idea, victims’
rights advocates argue that giving victims an established place within criminal procedure will not only better serve victims but will also promote a more equitable, fair, and just system. Indeed, over the last thirty years, the victims’ rights movement has taken strides toward creating a pronounced place for victims within criminal law.

One area where victims’ rights advocates have made particular progress is in victims’ increased participation at sentencing. Congress’s most recent piece of victims’ rights legislation, the Crime Victims’ Rights Act (CVRA),7 highlights the victim’s expanded role, as it grants to victims an express, enforceable right to be present and “reasonably heard” at sentencing in federal courts.8 In discussing the scope of this right, courts and commentators have embraced advocates’ calls for balance between the rights afforded to victims and defendants. In so doing, they have referenced the defendant’s sentencing allocation right as the model for victim allocation.9 For example, in \textit{United States v. Degenhardt}, the court commented:

\begin{quote}
One must note, however, that Justice Cardozo’s statement did not address the relationship between offenders and victims, but rather the relationship between the prosecution and the defense. \textit{Snyder}, 291 U.S. at 104-05 (holding that the jury’s view of crime scene where the defendant was not also present did not violate the defendant’s Fourteenth Amendment right to due process); \textit{see also}, e.g., \textit{Payne}, 501 U.S. at 827 (holding that the state should be able to present evidence at a capital sentencing hearing regarding the victim and the harm she suffered, in order to counter mitigating evidence presented by the defendant); \textit{Miranda v. Arizona}, 384 U.S. 436, 519 (1966) (Harlan, J., dissenting) (challenging the Court’s decision to suppress a defendant’s confession for alleged unfairness in police questioning); \textit{Haggins v. Warden}, 715 F.2d 1050, 1058 (6th Cir. 1983) (holding that the state’s evidence was admissible under the excited utterance exception to the hearsay rule); \textit{Virgin Islands v. Brown}, 507 F.2d 186, 190 (3d Cir. 1975) (rejecting the defendant’s proposition that he had a unilateral right to select the trial date, irrespective of the needs of the state and the court).
\end{quote}

7. 18 U.S.C.A. § 3771 (West 2007). The Crime Victims’ Rights Act (CVRA) was signed into law by President George W. Bush on October 30, 2004. Under the Act, the term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim’s estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim’s rights under this chapter, but in no event shall the defendant be named as such guardian or representative. \textit{Id.} § 3771(e).

8. \textit{Id.} § 3771(a)(3)-(4).

9. Allocation is

[a]n unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.
[T]he sentencing process cannot be reduced to a two-dimensional, prosecution versus defendant affair. Instead, the CVRA treats sentencing as involving a third dimension—fairness to victims—requiring that they be “reasonably heard” at sentencing. . . . [T]he CVRA commands that victims should be treated equally with the defendant, defense counsel, and the prosecutor, rather than turned into a “faceless stranger.”

Similarly, in Kenna v. United States District Court (Kenna I), the court held that the CVRA gives victims the right to speak at sentencing and interpreted the Act to place “crime victims on the same footing” as defendants. However, in calling for broader rights for victims at sentencing, victims’ rights advocates have done little beyond invoking comparisons between the rights granted to defendants and those afforded to victims. There has been very little discussion about whether the two practices can indeed be equated and, if so, how they inform one another. This Article engages in that analysis.

Despite the arguments offered by victims’ rights advocates that victims’ rights should be on par with defendant’s rights, an examination of defendant and victim allocution makes clear that the two practices do not serve as mirror images for one another. Defendant allocution exists primarily to make a calculable difference to the defendant’s sentence. Conversely, the goals underpinning victim allocution are more expansive in their scope. While victim allocution exists partly to give victims an opportunity to provide information that could affect the court’s sentencing determination, the practice also exists to enhance the dignity of the speaker, to provide the speaker with a therapeutic and cathartic outlet, to educate other participants in the sentencing proceeding, and to enhance the perceived fairness of the legal system. At base, the scope of the allocution right granted to victims at sentencing is broader than the right granted to defendants. In light of these differences, courts tend to review the denial of a defendant’s right to allocute in a more constrained manner than they review the denial of a victim’s right to allocute under the CVRA. The end result is that a victim’s allocution right is more likely to be enforced than a defendant’s corollary right. Therefore, despite the fact that the victims’ rights movement is predicated, in part, on arguments of fairness and equity, an imbalance exists between the underlying theories for, and enforcement of, victim and defendant allocution.

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11. 435 F.3d 1011, 1016 (9th Cir. 2006); see also, e.g., Richard A. Bierschbach, Allocation and the Purposes of Victim Participation Under the CVRA, 19 Fed. Sent’g Rep. 44, 46-47 (2006) (discussing the Kenna I and Degenhardt cases as seeking to treat “victims as equals with the other main players in the criminal process”); Amy Baron-Evans, Traps for the Unwary Under the Crime Victims’ Rights Act: Lessons from the Kenna Cases, 19 Fed. Sent’g Rep. 49, 51-52 (2006) (questioning whether the victim’s right to be reasonably heard includes the right to relitigate, as the functional equivalent of a party, a defendant’s sentence).
This incongruity should give victims' rights advocates a measure of pause. If advocates really do want to create more balance and equity between the treatment of victims and defendants at sentencing, the disconnect between the two practices should not be overlooked. The failure to acknowledge this disconnect, as well as the failure to appeal for some form of readjustment, makes victims' advocates calls for balance and equality in the criminal justice system ring somewhat hollow.

Perhaps advocates should concede that they have been too successful in their efforts and should consider narrowing the victim's allocution right so that it is more in line with the defendant's right. However, curtailing victim allocution so that it more closely mirrors defendant allocation is not the only way to address the imbalance between the two practices. Instead, I contend that the theories and purposes underlying victim allocution can be equally applied to defendant allocution, thereby expanding the scope and practice of the defendant's right. By construing the rite of allocution broadly for both victims and defendants, our criminal justice system may come closer to finding a true balance between the allocation right of victims and of defendants.12

Part I of this Article briefly summarizes the history of the victims' rights movement and examines the role that the fairness and equality arguments have played in advancing victims' rights. It also outlines the basic structure of the CVRA, its enforcement mechanisms, and the sentencing rights it affords to victims. Part II examines how courts have thus far addressed victim allocution under the CVRA. That Part identifies two theories that advance the practice—a relevancy theory and a rite-based theory—but concludes that the rite-based theory seems to predominate in justifying the right's existence. Part III examines the history and practice of defendant allocution, topics which have received only scant scholarly attention over the past sixty years. The examination reveals that, in contrast to victim allocution, defendant allocation is justified primarily by the mitigating effect it may have on a defendant's sentence. Its practice and enforcement, therefore, tend to be far narrower than the practice and enforcement of victim allocution. Finally, Part IV addresses this imbalance and advocates a reconceptualization of defendant allocation that would allow both victims and defendants to benefit from the transformative nature of the ritual of allocution.

I. Victims' Rights and the Crime Victims' Rights Act

A. Victims' Rights and Arguments for Equality

The Crime Victims' Rights Act (CVRA)13 is the most recent manifestation of a decades-old movement that has sought to respond to victims' needs in the criminal justice system. Some of the earliest efforts of the victims' rights move-
EQUAL RIGHTS FOR EQUAL RITES

ment trace as far back as the mid-1960s. However, victims' rights became a firmly established topic of national debate with the 1982 release of the President's Task Force on Victims of Crime Final Report. The Task Force, established in early 1982 by President Ronald Reagan, was commissioned to "conduct a review of national, state and local policies and programs affecting victims of crime," and to "advise the President and Attorney General with respect to actions which can be undertaken to improve . . . efforts to assist and protect victims of crime." Its Final Report provided a disturbing account of how victims were treated by the criminal justice system and how such treatment was often perceived by victims to be far worse than the treatment they suffered at the hands of the offender.

The Final Report invoked themes of equality and fairness in calling for the criminal justice system to change how it responds to victims. The Final Report claimed that when victims take the brave and socially responsible step to report the crimes committed against them,

they find little protection. They discover instead that they will be treated as appendages of a system appallingly out of balance. They learn that somewhere along the way the system has lost track of the simple

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15. For the remainder of this Article, I will refer to this source as the Final Report.


17. Id.

truth that it is supposed to be fair and protect those who obey the law while punishing those who break it. Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest.²⁹

In expressing further concern regarding the treatment of victims, the Final Report claimed, "A system that fails to be equitable cannot survive. The system was designed to be the fairest in history, but it has lost the balance that has been the cornerstone of its wisdom."²²

The imbalance that exists between victims and defendants is rooted within the public prosecution model, which generally structures how our country addresses crime.²¹ For most of our nation’s history, crime has been viewed not as a harm suffered by private individuals at the hands of others, but as a violation "which tears at the fabric of our peace and community and hence creates a harm that is greater than simply the harm to the victim involved."²² The public prosecution model emphasizes that certain wrongs so violate the norms of appropriate behavior in civil society that the power of the state should be brought to bear against individuals violating those norms. By conceiving of crime as acts that harm not only individual victims, but also all members of our body of ordered government, the state assumes the duties of prosecution and punishment, thereby relieving victims of the personal responsibility of holding perpetrators liable for their criminal acts.²³ However, the public prosecution model focuses on the relationship between the state and the offender, rather than the victim and the offender, and has therefore relegated victims to the roles of witnesses or of evidence. Institutional consideration of victims’ individual harms has become secondary to the state’s primary goals of deterring and punishing criminal activity.²⁴

²⁹. Task Force, supra note 2, at vi.

²². Id. at 16.


²². Twist, supra note 6, at 369-71.

²³. Under the private prosecution model, which predominated in earlier manifestations of our criminal justice system, victims bore the responsibility of prosecuting the defendant, as well as financing his incarceration. See McDonald, supra note 21, at 651-54 (describing the victim’s duties under the private prosecution model of criminal justice).

²⁴. Cardenas, supra note 21, at 371-72.
Victims' rights advocates have emphasized this imperfection of the public prosecution model by pointing out that "while criminal defendants have an array of rights under law," victims, and their families, [are] ignored, cast aside, . . . treated as non-participants in a critical event in their lives," and granted few rights or protections throughout the criminal justice process. Victims' rights laws, including the CVRA, seek to alter this seeming imbalance. Victims' rights advocates argue that the "criminal justice system . . . can and should care about both the rights of the accused and the rights of victims," and that a legal system which provides victims "with participatory rights is not only what the law requires but also the right course in providing justice for all. Once victims' rights are accepted as the rule of law to be followed, our federal criminal justice system will, in fact, be more just."28

The equal rights argument for expanding victims' rights has not escaped criticism. First, one must acknowledge that victims and defendants are not and cannot be treated as absolute equals in the criminal justice process. The defendant has a vital interest in being present and heard throughout the criminal process that cannot be matched by the victim. Unlike defendants, victims do not face the potential of having their liberty, property, or lives taken from them by the government. Skeptics have also expressed concern that the call for equality between victims and defendants is really a screen behind which those disdainful of defendants' broad constitutional rights can seek to undermine them.29


27. Id.

28. Russell P. Butler, What Practitioners and Judges Need To Know Regarding Crime Victims' Participatory Rights in Federal Sentencing Proceedings, 19 Fed. Sent'g Rep. 21, 22 (2006); see also, e.g., Twist, supra note 6, at 372 ("A justice system that affords its only rights to accused and convicted offenders, but preserves and protects none for its crime victims, has lost its essential balance. Moreover, such a system continues to lose the public's confidence and its claim to respect.").

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

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

Such language may justly lead one to feel great sympathy for crime victims. However, the image of the good victim and bad defendant is not as tidy as the Final Report implies. The mob member who gets shot during a dispute and the batterer who drives his partner to retaliatory violence are crime victims, just as is the old man who is mugged or the teenager who is raped. Similarly, some defendants do not so easily fit the “bad defendant” model. At one extreme, the innocent defendant defies this model. Likewise, it seems inaccurate to characterize the foolish, misled, or mere accomplice defendant as unequivocally “bad.” Nonetheless, by emphasizing the good victim/bad defendant construct, a call for victims’ rights can be easily transformed into a zero-sum game in which it is easy to conceive of granting greater rights to the more morally deserving of the two parties.

An equal participation or fairness model justifying victims’ rights may also insufficiently address some legitimate concerns that victims have regarding their treatment by the criminal justice system, as well as their victimization in

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31. Task Force, supra note 2, at 11.
32. Id. at 13.
34. See O’Hear, supra note 29, at 1-2; O’Hear, supra note 30, at 86.
general.35 Certainly, victims often desire to be notified of, observe, and participate in the trial for the crime committed against them to the same extent that is granted to the defendant. However, victims may have any number of other interests that are not as easily matched or balanced against the defendant’s rights. These include interests in “financial reparations, apology, mediated victim-offender dialogue, protection of identity and personal privacy, psychological counseling, and protective or rehabilitative measures to prevent revictimization.”36 Hence, an equal rights justification for victims’ rights is not and cannot be all encompassing.

Despite these legitimate criticisms, the argument for equal treatment of victims has been highly effective in establishing victims’ expanded role in the criminal justice system and remains a prevalent theme in justifying victims’ rights. Since the Final Report was issued in 1982, almost every state has passed some form of victims’ rights legislation,37 and over thirty states have passed amendments to their state constitutions granting rights to victims.38 Similarly,

35. See O’Hear, supra note 30, at 86.
36. Id.
37. State statutes have provided victims with the right to be informed of the status of their case and the defendant’s confinement. See, e.g., ALASKA STAT. § 12.61.010(a)(2)-(3) (2006); CAL. PENAL CODE § 679.03 (West 1999); IND. CODE § 35-40-5-8 (Supp. 2007); LA. REV. STAT. ANN. § 46:1844(A) (1999 & Supp. 2008); MISS. CODE ANN. § 99-36-5 (1999); N.M. STAT. ANN. § 31-26-4 (Michie 1978); S.C. CODE ANN. § 16-3-1530 (Supp. 2007); TEX. CODE CRIM. PROC. ANN. art. 56.08, 56.11-12 (Vernon Supp. 2007); UTAH CODE ANN. §§ 64-13-14.7(2) to (4), 77-38-3 (2004). State statutes have also provided victims with the right to be heard at any proceeding involving sentencing or post-conviction release decisions. See, e.g., ALA. CODE § 15-23-74 (1995); FLA. STAT. § 960.001(1)(a)(5) (2006); MISS. CODE ANN. § 99-36-5(1)(e) (1999); TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(5) (Vernon 2006 & Supp. 2007); WASH. REV. CODE § 7.69.030(13) (2007).
38. See, e.g., ALA. CONST. amend. 557; ARIZ. CONST. art. 2, § 2.1; COLO. CONST. art 2, § 16a; FLA. CONST. art. 1, § 16(b); ILL. CONST. art. I, § 8.1; LA. CONST. art. I, § 25; Mich. Const. art 1, § 24; MO. CONST. art. 1, § 32; NEV. CONST. art. 1, § 8; N.M. CONST. art II, § 24; OHIO CONST. art. I, § 10a; Or. CONST. art. 1, § 42; Tex. Const. art. 1, § 30; VA. CONST. art. I, § 8-A; Wash. CONST. art. I, § 35. Many of the state amendments grant victims the right to be treated with fairness and promise that a victim’s right to justice and due process will be protected. See, e.g., ARIZ. CONST. art. 2, § 2.1(a); Conn. Const. amend. art. XXIX, § b; Idaho Const. art. 1, § 22(1); N.J. Const. art. I, p. 22; OHIO CONST. art. I, § 10a; Tenn. Const. art. I, § 35. It must be noted however, that a number of the state victims’ rights amendments limit the rights granted to victims by providing that a victim’s rights cannot exceed a defendant’s constitutionally protected rights and cannot serve as the basis to set aside, reverse, or vacate the result of a criminal proceeding. See, e.g., Conn. Const. amend. art. XXIX, § b; Idaho Const. Art. I, § 22; OHIO CONST. art. I, § 10(a); Wis. Const. art. I, § 9m.
on the federal level, Congress has passed numerous pieces of victims' rights legis-
lation,\textsuperscript{39} the most recent of which is the CVRA.

B. The Crime Victims' Rights Act (CVRA)

The CVRA provides victims of federal crimes the right to be present and rea-
sonably heard at any public court or parole proceeding,\textsuperscript{40} including senten-
cing proceedings.\textsuperscript{41} The CVRA further vests victims with standing to challenge
violations of their rights through the writ of mandamus. Normally, the writ is
viewed as an extraordinary remedy granted only under very specific circum-
stances.\textsuperscript{42} However, by directing that courts "shall take up and decide" any mo-
tion filed by a victim, the CVRA eliminates the discretionary nature of manda-
mus relief and instead requires a court to consider every victim's complaint.\textsuperscript{43}
Pursuant to the statute, a victim must first assert her rights "in the district court
in which the defendant is being prosecuted for the crime, or if there is no prose-
cution underway, in the district court in the district where the crime oc-
curred."\textsuperscript{44} The district court must address the victim's claim, and if the claim is

\begin{footnotesize}
\begin{enumerate}
\item 18 U.S.C.A. § 3771 (West 2007). Previously passed federal victims' rights legis-
lation includes the Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510 (2000), the
of Crime Act of 1984, 42 U.S.C. § 10,601 (2000), and the Victim and Witness Pro-
\item 18 U.S.C.A. § 3771(a)(3)-(4) (West 2007). A victim can only be excluded from
these proceedings if a court decides, based on clear and convincing evidence, that
any testimony the victim might provide would be materially altered by other in-
formation the victim might hear at the proceeding. Id. § 3771(a)(3).
\item Id. § 3771(a)(4). The 1982 President's Task Force on Victims of Violent Crime Final
Report significantly advanced the argument for victim allocution at sentencing,
recommending in part that victims be permitted to present impact statements.
Task Force, supra note 2, at 18, 33; see also supra note 37 (listing state statutes
granting victims the right to be heard at sentencing and post-conviction release
proceedings). The Supreme Court's decision in \textit{Payne v. Tennessee} further legiti-
mized the presence of victims at sentencing and their presentation of impact evi-
dence, albeit as witnesses for the state. 501 U.S. 808 (1991); see also infra notes 58-
60 and accompanying text (discussing the role of victim statements at sentencing
in capital trials).
\item See Kenna v. U.S. Dist. Court (\textit{Kenna I}), 435 F.3d 1011, 1017 (9th Cir. 2006); Senate
Floor Statement in Support of the Crime Victims' Rights Act, 150 CONG. REC. S9091
69, 72 (2006) [hereinafter \textit{October 2004 Senate Floor Statement}].
\item 18 U.S.C.A. § 3771(d)(3) (West 2007) (emphases added); see also \textit{Kenna I}, 435 F.3d
at 1017; \textit{In re Huff Asset Mgmt. Co.}, 409 F.3d 555, 563 (2d Cir. 2005); Kyl et al., su-
pra note 6, at 618; \textit{October 2004 Senate Floor Statement}, supra note 42, at 72.
\item 18 U.S.C.A. § 3771(d)(3) (West 2007).
\end{enumerate}
\end{footnotesize}
denied, the victim may petition the court of appeals for review. The CVRA provides a streamlined procedure by which a single judge of the appropriate court of appeals can review the victim's petition for the writ of mandamus, and directs the court to issue a decision within seventy-two hours after the petition is filed. If the court denies the victim's request for relief, the court is required to issue a written opinion clearly stating its reasons for doing so.

The CVRA does place some limits on a victim's request for relief. First, violation of a victim's rights under the statute does not authorize the victim to seek a new trial of the defendant. Similarly, if a victim is denied her right to be heard at sentencing or any other appropriate proceeding, the victim can file a motion to reopen the plea or sentence only where she asserted the right to be heard before or during the proceeding at issue and such right was denied; the victim petitioned the court of appeals for a writ of mandamus within 10 days; and in the case of a plea, the accused did not plea to the highest offense charged.

The statute also dictates that "[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter." Presumably, this time limit and the seventy-two hour constraint placed on the courts of appeal guard against placing the defendant in a state of limbo in terms of entering a plea, arguing for pre-trial release, or proceeding to sentencing.

In summary, the CVRA, along with the state and federal statutes that preceded it, seeks to ensure that victims are no longer silent Victorian children within the criminal justice system. Instead, the CVRA establishes victims as independent participants, distinct from the government, in the administration of criminal justice. The scope of that independence, and arguments for supporting the victim's expanded role, however, should be subject to additional examination. The sentencing rights granted to victims under the CVRA comprise one area in which to assess whether, and to what extent, victims' independent role is appropriately balanced against defendants' rights.

45. Id.
46. Id.
47. Id.
48. Id. § 3771(d)(5).
49. Id.
50. Id. § 3771(d)(3).
51. Kenna v. U.S. Dist. Court (Kenna I), 435 F.3d 1011, 1013 (9th Cir. 2006).
52. See infra notes 61-65 and accompanying text.
II. Victim Allocution Under the CVRA

A. The Goals of Victim Allocution

Since passage of the CVRA in 2004, courts have already begun to examine the scope of victim allocation rights under the statute. *Kenna I*, 435 F.3d 1011; *United States v. Degenhardt*; and *United States v. Marcello* provide a snapshot of the current status of victim sentencing participation under the CVRA. This small but growing body of case law highlights that victim allocation exists to serve a variety of purposes. These purposes include:

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

More simply, one could describe these three goals as (1) empowering the victim, (2) educating the defendant, and (3) informing the court.

These three goals are supported by two distinct theories. The relevancy theory centers on the impact that victim allocution statements have on the calculation of the defendant’s sentence. The rite-based theory focuses on the ritualistic power of standing before a court and expressing one’s views. This latter theory addresses, in part, the relationship created between a victim and a defendant as a result of the defendant’s criminal acts. By allowing the victim to participate in the ritual of speaking in court, the victim is provided with the opportunity to alter that relationship through personal empowerment and education of the defendant. Both the relevancy and rite-based theories for victim allocution are evident in how courts have thus far applied the CVRA. However, I contend that the rite-based theory better accounts for how courts describe, apply, and uphold the victim’s right to be heard at sentencing.

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53. 435 F.3d 1011; see also *In re Kenna (Kenna II)*, 453 F.3d 1136 (9th Cir. 2006) (per curiam) (deciding the companion case to *Kenna I* in which the victim sought unfettered access to the defendant’s presentence report).
57. In her article, *Beyond Mitigation: Towards a Theory of Allocution*, Professor Kimberly Thomas engages in a similar analysis regarding the theories for defendant allocution. Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 *Fordham L. Rev.* 2641, 2643-44 (2007). Thomas identifies a mitigation theory and a humanization theory underlying defendant allocution. *Id.* Her work is par-
B. A Relevancy Theory for Victim Allocation

When one reviews the purposes for victim allocution, the last articulated purpose—informing the court—nicely furthers the relevancy theory for victim allocution. The theory proffers that a core justification for victim allocution centers on the victim's contribution to the sentencing outcome. In essence, victims should be granted the right to allocate because their statements relate to the court's determination of the appropriate sentence for the defendant. Senator Kyl, a sponsor of the CVRA, highlighted this relevancy theme when he stated that the content of victim allocution should include "all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victim's family and the community, and sentencing recommendations." These three categories of victim sentencing information define the traditionally acceptable content for victim impact statements (VIS), a closely aligned but distinguishable practice from the broader victim sentencing rights provided by the CVRA.

With VIS, the victim traditionally testifies as a witness, generally for the state. What the victim can say is limited by evidentiary rules and is subject to constitutional challenge in capital cases. In contrast, when a victim exercises her right to be reasonably heard at sentencing under the CVRA, she is not acting as a witness. The victim's act of speaking is an individual choice, separate from any decision of the state or defense. The victim also has greater latitude to express opinions independent of and contrary to those presented by the gov-

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58. October 2004 Senate Floor Statement, supra note 42, at 70 (statement of Sen. Kyl); see also April 2004 Senate Floor Statements, supra note 18, at 64 (statement of Sen. Feinstein) (indicating that victims should be able to provide "any information, as well as their opinion . . . concerning the . . . sentencing of the accused").

59. VIS has received the most attention in the context of capital sentencing. In Payne v. Tennessee, 501 U.S. 808 (1991), the Supreme Court held that a state's use of VIS at sentencing did not per se violate a defendant's rights under the Eighth Amendment. Id. at 827. But see id. at 831 (O'Connor, J., concurring) (suggesting that VIS should be excluded where they are unduly inflammatory). As the post-Payne case law has evolved, three major categories of victim impact statements are regularly received. See, e.g., United States v. Sampson, 332 F. Supp. 2d 325, 338 (D. Mass. 2004) (noting that VIS has become a "regular, legitimate feature" of federal capital trials). These categories are as follows: (i) statements regarding the nature of the victim, (2) statements regarding the emotional impact of the crime, and (3) statements regarding the victim's opinion of the nature of the defendant's actions, as well as the victim's opinion about the appropriate sentence for the defendant. See supra note 58 and accompanying text. In the context of non-capital cases, it is generally accepted that all three types of VIS are acceptable. See, e.g., Booth v. Maryland, 482 U.S. 496, 507 n.10, 509 n.12 (1987), overruled in part by Payne, 501 U.S. 808; George v. Angelone, 100 F.3d 353, 359-60 (4th Cir. 1996); United States v. Santana, 908 F.2d 506, 507 (9th Cir. 1990); Kyl et al., supra note 6, at 608.
ernment, which might include expressing forgiveness or mercy or pleading for a shorter sentence for the defendant.60

In this regard and under the CVRA, victims have been deemed “independent participants” in the criminal process.61 However, victims’ status as independent participants under the CVRA has not transformed them into parties or even quasi-litigants. In In re Kenna (Kenna II),62 the court rejected the victim’s argument that his right to be reasonably heard under the CVRA included the right to litigate, as a party, the calculation of the defendant’s sentence.63 Nor does the CVRA put a victim in a position ahead of the defendant or the state by permitting him to “present evidence for the first time at the sentencing hearing under the guise of unsworn allocution.”64 But however one defines the victim’s

60. See Stephanos Bibas & Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 YALE L.J. 85, 141 (2004); Bierschbach, supra note 11, at 45-47; Erez, supra note 18, at 497-98; Andrew J. Karmen, Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice, 8 ST. JOHN’S J. LEGAL COMMENT. 157, 162 (1992); Tobolowsky, supra note 14, at 84-85.


62. 435 F.3d 1136 (9th Cir. 2006) (per curiam); see also Baron-Evans, supra note 11, at 51-53 (discussing In re Kenna and noting that the victim in that case argued that his right to be reasonably heard included access to the defendant’s presentence report so that the victim could present arguments at resentencing regarding the calculation of the defendant’s sentence).

63. Id. at 1137; see also Matthew B. Riley, Note, Victim Participation in the Criminal Justice System: In re Kenna and Victim Access to Presentence Reports, 2007 UTAH L. REV. 235, 250 (discussing the In re Kenna decision and noting that while the CVRA may seek to make victims full participants in the criminal justice system, they are not treated as absolute equals with the prosecution and the defense).

64. Baron-Evans, supra note 11, at 51.
participatory rights, the victim's status as an independent participant provides him with the autonomy to decide whether or not to speak at sentencing.\textsuperscript{65}

Despite the differences between traditional VIS and victims' allocution rights under the CVRA, Senator Kyl's reference to VIS as an analogue to victim CVRA allocution strongly implies that a victim's statement should be relevant to the court's sentencing determination. Extrapolating from the VIS context, courts tend to view the three categories of victim impact evidence cited by the CVRA's authors as means to inform "the sentencing authority about the specific harm caused by the crime in question,"\textsuperscript{66} and thereby aid the court in reaching a sentencing outcome.

Cases interpreting victims' CVRA sentencing rights highlight this relevancy theme. For example, in \textit{United States v. Marcello}, the court addressed a victim's analogous right under the CVRA to be reasonably heard at the pre-trial release/detention hearing of two defendants charged with murder.\textsuperscript{67} The \textit{Marcello} court indicated that the son of the murder victim did not have the absolute right to speak in open court because the content of the son's statement was not material to the court's release decision.\textsuperscript{68} The court stated that, in making its decision whether to release the defendants, it was required to consider the strength of the case against the defendants, the seriousness of the crime with which the defendants were charged, and "the reasonable apprehension of personal danger to the victim."\textsuperscript{69} There was no question that the crimes with which the defendants were charged were serious, and the son made no claim that he would be at risk if the defendants were released. According to the court, the only potential information the son could provide related to the strength of the case against the defendants. The court determined that the son was in no position to offer an opinion on this matter, especially since the alleged murder had occurred twenty years earlier.\textsuperscript{70} Therefore, the court concluded that it was not required to hear from the son.\textsuperscript{71}

\textsuperscript{65} Kenna I, 435 F.3d at 1013, 1016; United States v. Degenhardt, 405 F. Supp. 2d at 1344; \textit{October 2004 Senate Floor Statement}, supra note 42, at 70; Beloof, \textit{Judicial Leadership}, supra note 61, at 37-38.


\textsuperscript{67} 370 F. Supp. 2d 745, 746-50 (N.D. Ill. 2005). While addressing an issue distinct from the victim's right to be heard at sentencing, the \textit{Marcello} court's analysis is nonetheless relevant in that it examined the portion of the CVRA which grants victims both the right to be heard at pre-trial release hearings and at sentencing proceedings. \textit{See} 18 U.S.C.A. § 3771(d)(4) (West 2007) (giving victims the "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding").

\textsuperscript{68} 370 F. Supp. 2d at 747.

\textsuperscript{69} \textit{Id}.

\textsuperscript{70} \textit{See} \textit{id.} at 747 & n.5.

\textsuperscript{71} \textit{Id}. at 748.
In the course of reaching its conclusion, however, the court indicated that its ruling should not be interpreted to wholly preclude a victim's right to be heard at sentencing. Indeed, the court strongly suggested that, in the context of sentencing,

the policy of hearing the victim is wise. . . . [I]n a moral sense, [the victim is] a party to the case and . . . should always be given the opportunity to testify at all sentencing hearings and some bond hearings. . . . [This is due to the] likelihood that the victim's statements would be material and relevant to the issue before the court.72

The court further opined that victim "statements will (at least in sentence and prison release hearings) almost always be relevant, material and spoken from [the victim's] personal knowledge."73 However, the court was unwilling to rule that § 3771(d)(4) requires that victims have the opportunity to speak to the court in all instances. Instead, the court limited the victim's right to speak by focusing on the materiality and relevancy of what the victim had to offer. Hence, according to the Marcello court, a victim should be guaranteed only the right to contribute information to the sentencing process that could affect the outcome of the proceeding.74

In Kenna I, the relevancy of a victim's allocution statement was also addressed. There, father and son defendants "swindled scores of victims out of almost $100 million."75 At the father's sentencing hearing, several victims presented written impact statements, and Mr. Kenna, another victim, spoke to the court regarding the effect the defendants' crimes had on him. Three months later, the son was sentenced, and Mr. Kenna again sought to exercise his CVRA rights at sentencing. The trial court denied his request, stating:

I listened to the victims the last time . . . and, quite frankly, I don't think there's anything that any victim could say that would have any impact whatsoever. . . . [W]hat can you say when people have lost their life savings and what can you say when the individual who testified last time put his client's [sic] into this investment and millions and millions of dollars and ended up losing his business? There just isn't anything else that could possibly be said.76

72.  Id. at 746 n.2.
73.  Id. at 750 (emphasis added).
74.  Id. The CVRA also directs that where a victim is denied the right to be reasonably heard at a plea hearing, the victim cannot seek to reopen that proceeding if the defendant entered a plea to the highest crime charged. 18 U.S.C.A. § 3771(d)(5)(C) (West 2007). The implication and assumption here is that the victim would wish to speak against the defendant entering a plea to a lower offense, but would have nothing relevant to offer or contribute to the proceeding if the defendant entered a plea to the highest offense charged.
75.  Kenna v. U.S. Dist. Court (Kenna I), 435 F.3d 1011, 1012 (9th Cir. 2006).
76.  Id. at 1013 (quoting the district court's explanation).
The trial court seemed to indicate that there was no need to hear Mr. Kenna because nothing he could say would make a difference to the judge's sentencing determination. Many of the victims had already spoken or addressed the court in written form at the father's sentencing hearing, and according to the trial court, this was sufficient.

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

C. A Rite-Based Theory for Victim Allocution

A relevancy theory alone, however, cannot account for the other proffered purposes of victim allocation under the CVRA. The goals of empowering the victim and morally educating the defendant have very little bearing on the calculation of the defendant's sentence. Instead, these additional goals reveal that victim allocation is also important because it focuses on the relationship created between the victim and the defendant as the result of the defendant's criminal acts, and seeks—through the ritual of the victim speaking before the court—to change that relationship. Here, the additional goals of victim allocation are supported by a rite-based theory, which focuses on the transformative value that the ritual of sentencing allocation provides to the victim.

A growing body of scholarship addresses the connection between informal social norms, such as rituals, and the influence such practices have on our formal legal constructs. Generally, rituals are employed to maintain the political

77. Id. at 1016.
78. Id. at 1016-17.
79. Id.
power of our government systems and bring legitimacy to other equally important social structures.\(^{81}\) For example, most people begin long-term relationships with a wedding or commitment ceremony, acknowledge a shift in authority through inaugurations and installations, and reinforce their patriotism through the reciting of the Pledge of Allegiance.\(^{82}\) Likewise, the structured, repetitive, and ceremonial aspects of a trial undergird its legitimacy as this country's primary method of dispute resolution.\(^{83}\)

The ritual of trial begins with the call of “all rise” and is finalized with the pounding of the judge’s gavel. Between these two distinct moments, the trial participants engage in a series of ceremonial procedures that resemble a dramatic performance. The overseer of the drama wears the costume of a black robe and must be addressed using such official titles as “Judge,” “Your Honor,” and “May it please the court.” The trial occurs in a defined space—the courtroom—that is designed to further the authority and gravitas of the events that occur in its arena. For example, the judge is placed above the trial participants on her “bench.” Likewise, jurors and witnesses have designated physical spaces, or “boxes,” where they sit during the ritual, and they cannot perform their duties without first taking an oath. Additionally, the jury and their deliberations are treated with an aspect of ritual and ceremony. They retreat from the courtroom to discuss in private their determination of guilt or innocence, only then to return to the open forum to pronounce their verdict. At this momentous part of the ritual, all present in the room are again commanded to rise upon the jury’s entry.\(^{84}\) The final call of “all rise” upon the jury’s reentry signals that this ritual, whose curtain rose with the same invocation, will soon conclude.

This ritual of the criminal trial represents a “dramatization of the values of our spiritual government.”\(^{85}\) The state is dignified as the enforcer of the law, while the defendant is dignified as a challenger of the state, whether he is a dissenter, radical, or criminal.\(^{86}\) The trial’s participants—judge, defendant, victim, witness, and jury—serve as conduits to express the ritual’s underlying purposes—the determination of guilt and administration of justice.

The regularity and repetition that characterizes ritual “sets [it] apart from the ordinary course of life, lifts it from the realm of everyday

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81. Chase, supra note 80, at 114 (citing David I. Kertzer, Ritual, Politics, and Power 9 (1988)).
82. See Miller, supra note 80, at 1208-14 (marriage ceremonies and inaugurations); Sheldon H. Nahmod, The Pledge as Sacred Political Ritual, 13 WM. & MARY BILL RTS. J. 797 (2005) (Pledge of Allegiance).
83. Chase, supra note 80, at 114-15.
84. Id. at 117-21.
86. Id.
practical affairs, and surrounds it with an aura of enlarged importance." It creates a time and space which is, if not quite sacred, at the very least emotionally charged.87

The ritual of trial also allows for individual, social, and societal transformation. In discussing dispute resolution procedures of the Chagga, a tribe living in the Mount Kilimanjaro area, Sally Falk Moore noted that by submitting a dispute to the authority of others, the dispute between the parties was transformed into an affirmation by others.88 "By the end of the judicial process the relative positions of the disputing parties are altered in relation to one another, in relation to the tribunal, and in relation to the community the tribunal represents."89 A dispute turns into a ruling; a conflict is transformed into resolution; an imbalance is righted into balance. So too in the American ritual of the criminal trial. Even if the trial participants are unwillingly present, as is most likely the case for the defendant, and perhaps even the victim, they nonetheless come together "with a transcendent sense of reality and meaning, [and the ritual encourages them] to be open to changes in their sense of self."90

The transformative nature of the ritual of trial is particularly important when one examines crime from a relational standpoint. Through the commission of crime, the defendant's acts place him in a position superior to the individual he has harmed.91 The defendant's acts objectify the victim by treating that person as a means to an end—the commission of the crime—and simultaneously indicate his belief that community norms do not apply to him.92 While others may be bound to follow the law, the offender, by departing from social norms, emphasizes that he rejects being a part of, and living in relation to, his community. Crime, then, represents a social and moral imbalance between the victim, defendant, and society. The legal system, and more specifically, the ritual of trial, seeks to redress this imbalance.93

87. Cammack, supra note 80, at 789 (alteration in original) (quoting CLIFFORD GEERTZ, Deep Play: Notes on the Balinese Cockfight, in THE INTERPRETATION OF CULTURES 412, 448 (1973)).

88. CHASE, supra note 80, at 117 (citing Sally Falk Moore, Selection for Failure in a Small Social Field: Ritual Concord and Fraternal Strife Among the Chagga, Kilimanjaro, 1968-1969, in SYMBOL AND POLITICS IN COMMUNAL IDEOLOGY: CASES AND QUESTIONS 109 (Sally Falk Moore & Barbara G. Myerhoff eds., 1975)).

89. Moore, supra note 88, at 114.

90. Miller, supra note 80, at 1191.


93. Id. at 111-12; Henderson, supra note 91, at 594-95.
In granting the victim the opportunity to be heard prior to the pronouncement of the defendant's sentence, the victim gains access to a forum that directly and individually acknowledges her victimhood.

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

The ritual of victim allocution also serves to educate the defendant. When forced to hear directly from the victim, the defendant learns that his actions did not occur in isolation, and that they have legal as well as moral and emotional ramifications.

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

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

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94. Bierschbach, supra note 11, at 46; see also Erez, supra note 18, at 488 (citing to research which notes that two-thirds of victims participated at sentencing for therapeutic or expressive reasons).
95. Erez, supra note 18, at 492. Professor Erez’s research also indicates that victims value the opportunity to participate at sentencing because their status as victims is recognized in the official forum of the courts.
96. See id. at 496-97.
97. Id.
himself in light of learning directly from the victim about how his choices impacted her.

This rite-based approach to victim allocution has been embraced by courts interpreting the CVRA. Courts emphasize, sometimes in the very same decisions that invoke the relevancy theme, that permitting victims to engage in the rite of allocution is important regardless of the relevance of the victim's statement to the court's sentencing decision. For example, in United States v. Degenhardt, the court indicated that

even if a victim has nothing to say that would directly alter the court's sentence, a chance to speak still serves important purposes. As the First Circuit has pithily explained, "allocation is both a rite and a right." Part of the rite is a chance for the participants ... to have their say before sentence is imposed. That process is short-circuited if one of the participants—the victim—is denied an opportunity to speak.9

Similarly, in Kenna I, the court stated that victim allocution is important because the victim should have the opportunity to "confront [the] defendant who has wronged [her] ... [and] look [the] defendant in the eye and let him know the suffering his misconduct has caused."99 In this regard, what a victim has to say may not have legal significance, but the practice is nonetheless important because of the dignitary, cathartic, and moral education goals it furthers.

The way in which courts have specifically interpreted the CVRA's language granting victims the "right to be reasonably heard at ... sentencing" further advances the rite-based theory for victim allocution. The statute's language has caused some commentators and jurists to question whether the victim has the right to speak to the court, or whether the victim's views can be limited to some other form, such as a written presentation. In Kenna I and Degenhardt, the courts concluded that the CVRA provided victims with the right to speak at sentencing,101 while the court in Marcello implied that the victim's right to address the court should be predicated on the relevancy of the victim's proffered statement.102

In reaching these divergent results, all three courts began by acknowledging that the phrase "reasonably heard" can be interpreted in a variety of context-

98. 405 F. Supp. 2d 1341, 1349 (D. Utah 2005) (quoting United States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994)). Professor Douglas E. Beloof agrees that the under the CVRA, "whether or not the victim has relevant facts to present does not matter." Beloof, Judicial Leadership, supra note 61, at 39.

99. 435 F.3d 1011, 1016-17 (9th Cir. 2006).

100. 18 U.S.C.A. § 3771(a)(4) (West 2007).

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

102. 370 F. Supp. 2d 745, 746, 747-48 (N.D. Ill. 2005); see supra notes 67-74 (discussing Marcello in greater depth).
dependent ways. For example, one could interpret the right to be "reasonably heard" by drawing an analogy between hearing and speaking. In common English, one cannot be heard unless there is sound, presumably through the act of speaking. Alternatively, the phrase "reasonably heard" could be interpreted as a legal term of art, "commonly understood as meaning to bring one's position to the attention of the decision maker orally or in writing." The courts in *Kenna I* and *Degenhardt* also acknowledged that the CVRA's language granting victims the right to be reasonably heard is inconsistent with the language of Federal Rule of Criminal Procedure 32(i)(4)(B) granting a specific subset of crime victims the right to speak at sentencing. The courts recognized that this varying language could raise additional questions regarding the scope of the CVRA right. They nonetheless resolved this linguistic inconsistency in favor of a victim's right to speak by turning to the legislative history of the statute.

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103. *Kenna I*, 435 F.3d at 1014; *Degenhardt*, 405 F. Supp. 2d at 1345-46; *Marcello*, 370 F. Supp. 2d at 748.

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

105. Id. (emphasis added); see *Degenhardt*, 405 F. Supp. 2d at 1345.

106. *Kenna I*, 435 F.3d at 1014; *Degenhardt*, 405 F. Supp. 2d at 1346-47. The CVRA grants victims the right to be "reasonably heard," 18 U.S.C.A. § 3771(a)(4) (West 2007) (emphasis added), while Rule 32(i)(4)(B) directs that prior to imposing a sentence, "the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence." Fed. R. Crim. P. 32(i)(4)(B) (emphasis added). The Federal Rule has been subject to criticism and judicial revision. See, e.g., *Degenhardt*, 405 F. Supp. 2d at 1342-43 (holding that the CVRA's broad grant of allocution rights to all victims overrides the Federal Rule's more limited grant of allocution rights only to victims of violent or sexual assaults); Barnard, *supra* note 56, at 40-41 (advocating for a change to the federal rules); Cassell, *supra* note 61, at 856, 886.

The Rule is currently under review. An amendment has been proposed to delete the language granting allocution rights only to victims of violent or sexual crimes. It is expected that this amendment will be granted, bringing Rule 32(i)(4)(B) into accordance with the CVRA's grant of sentencing allocution rights to all crime victims. See *Degenhardt*, 405 F. Supp. 2d at 1346 n.26; Advisory Comm. on the Fed. Rules of Criminal Procedure, *Proposed Amendments to the Federal Rules of Criminal Procedure To Implement the CVRA*, 19 Fed. Sent’g Rep. 144, 144, 146 (2006) [hereinafter *Proposed Amendments*]. Other portions of the Rules are also under review, along with a proffered new Rule 43.1, which seeks to more fully integrate victims into the criminal process in accordance with the CVRA. See *Proposed Amendments*, supra, at 146.

107. *Kenna I*, 435 F.3d at 1015; *Degenhardt*, 405 F. Supp. 2d at 1345. The court in *Marcello* questioned the helpfulness of the CVRA's legislative history, noting that it is extremely limited, consists merely of statements by the law's primary author and co-sponsor, and lacks any of the "debate or exchange of ideas that more fre-
In particular, the courts turned to floor statements made by the statute’s two sponsors, Senator Diane Feinstein of California and Senator John Kyl of Arizona. In these statements, the Senators emphasized that the victim’s right to be reasonably heard was “intended to allow crime victims to directly address the court in person.” Senator Kyl also emphasized it was not Congress’s intent that the term “reasonably” in the phrase “to be reasonably heard”... provide any excuse for denying a victim the right to appear in person and directly address the court... This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term “reasonably” is meant to allow for alternative methods of communicating a victim’s views to the court when the victim is unable to attend the proceedings.

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

The Kenna I and Degenhardt courts further reasoned that the goals of victim allocution are most efficiently served when victims are granted the right to voice their views in person. A written presentation hardly seems adequate where “victims want an opportunity to force defendants to confront the human toll of their crimes. Such confrontation is only possible in open court, where the victim has an opportunity to stand face-to-face with her victimizer and explain the pain that flowed from the crime.” To interpret the statute otherwise would shortchange the victim allocution goals of empowering the victim and educating the defendant.

The CVRA thus acknowledges that victim allocution should dignify the victim’s personal experience by granting the victim the opportunity to address the court. Likewise, interpreting the victim’s sentencing right as the rite of speaking enlightens the defendant. The defendant’s understanding of the victim’s ex-
perience is not limited to the government’s presentation of evidence, but is broadened by hearing directly from the victim, in her own independent voice.\footnote{113}

\section*{D. The Correction of Victim Allocution Denials}

The CVRA’s treatment of denials of victim allocution signals that as between the relevancy and rite-based theories, the latter may better explain and justify how courts approach this right. The CVRA’s language, and courts’ interpretation and application of the same, emphasize that when a victim is denied the right to allocate, the error should be corrected. Specifically, and as discussed \textit{supra}, victims can seek to enforce their rights under the CVRA by filing a writ of mandamus with the appropriate court of appeals.\footnote{114} If the court deems an error has occurred, the victim can make a motion to reopen the proceedings in the trial court.\footnote{115}

\footnote{113. A lingering practical problem in interpreting the CVRA as granting victims the right to speak must nonetheless be acknowledged. The CVRA explicitly directs that [i]n a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings. 18 U.S.C.A. § 3771(d)(2) (West 2007). Hence, even though a victim may desire to verbally address the court, in certain circumstances, a judge can legitimately deny the victim that opportunity.

Advocates for the CVRA, as well as courts who hold that the statute grants victims the right to speak, do not address this problem satisfactorily. They celebrate the victim’s right to speak, while minimizing the CVRA’s express command that a court can decide otherwise. For example, in \textit{Degenhardt}, the court asserted that victims should never be denied their right to speak at sentencing, while simultaneously acknowledging that the CVRA grants courts the power to fashion an alternative procedure when faced with a large number of victims. 405 F. Supp. 2d at 1351. By allowing judges to place limits on the number of victims permitted to speak, the statute dampens a rite-based approach to allocution, and likewise hampers fulfillment of the proffered dignitary and moral education aspects of the practice. In this regard then, drafters of, and advocates for, the CVRA seem to be speaking out of both sides of their mouths. In a loud voice, advocates proclaim to victims, “Your rights are absolute,” while under their breath they reluctantly mutter, “except where impracticable.”}

\footnote{114. 18 U.S.C.A. § 3771(d)(3) (West 2007); see \textit{supra} notes 42-50 and accompanying text.}

\footnote{115. 18 U.S.C.A. § 3771(d)(5)(A)-(C) (West 2007); see also, \textit{e.g.}, \textit{Kenna} v. U.S. Dist. Court (\textit{Kenna I}), 435 F.3d 1011, 1018 (9th Cir. 2006) (granting the victim’s petition for a writ of mandamus and ordering the district court to accept any timely filed motions to reopen sentencing proceedings by the victim). A victim’s right to request that a sentencing hearing be reopened is predicated on the victim’s compliance with the procedural requirements of the CVRA. See \textit{id.} § 3771(d)(5)(A)-(B)
In *Kenna I*, the court indicated that the CVRA requires courts to issue the writ “whenever [they] find that the district court’s order reflects an abuse of discretion or legal error.” It went on to determine that the district court’s denial of the victim’s right to allocate constituted a legal error requiring correction. The court described a victim’s right to speak at sentencing as “indefeasible.” As a result, the court stated that when a court has denied a victim her right to allocate, the only way to “give effect to [the victim’s] right to speak as guaranteed . . . by the CVRA [is] to vacate the sentence and hold a new sentencing hearing.” This approach implies that such denials should be treated as reversible error. In essence, when the right has been denied, it must be corrected. Similarly, in *United States v. Degenhardt*, in support of its position that courts do not possess the discretion to deny a victim the right to allocution, the court cited a series of cases regarding the review of defendant allocution denials that employed a reversible-error standard. As interpreted in *Degenhardt*, the defendant allocution cases instruct that the denial of allocution always prejudices the holder of the right. Consequently, the right must always be provided, and by implication, be corrected when denied.

The courts’ broad approach to the correction of errors indicates that victims should always be granted their allocution right, regardless of whether they have anything to say that would alter the defendant’s sentence. Hearing from the victim is important not simply because the victim may provide information to the court, but also because the victim and defendant might benefit in various ways from speaking in the other’s presence regarding the crime. In correcting (establishing that a victim must clearly assert her rights before the district court, and then petition the court of appeals for a writ of mandamus within ten days of the district court’s denial of her right).

116. 435 F.3d at 1017.
117.  Id.
118.  Id. at 1016. *Black’s Law Dictionary* defines “indefeasible” as “not vulnerable to being defeated, revoked, or lost.” *Black’s Law Dictionary* 783 (8th ed. 2004).
119.  435 F.3d at 1017.
120.  405 F. Supp. 2d 1341, 1349 n.45 (D. Utah 2005) (citing cases).
121.  In citing the defendant allocution cases, however, the court in *Degenhardt* failed to acknowledge that the reversible-error approach does not prevail among the federal courts and that several of the courts it cited currently employ a Rule 52 analysis for defendant allocution denials. *Compare* United States v. Griggs, 431 F.3d 1110, 1114 n.4 (8th Cir. 2005) (implying that a harmless-error analysis is appropriate for denial of a defendant’s right to allocate), and United States v. Reyna, 358 F.3d 344, 350 (5th Cir. 2004) (rejecting a reversible-error approach in favor of harmless-error review), with United States v. Walker, 896 F.2d 295, 301 (8th Cir. 1990) (holding that denial of a defendant’s right to allocate requires a remand for resentencing), and United States v. Posner, 868 F.2d 720, 724 (5th Cir. 1989) (treating an allocution error as reversible). For further discussion of the standard of review for defendant allocution denials, see infra Section III.C.
victim allocution denials, therefore, the transformative value of the rite of allocution takes precedence over the value of any calculable impact the victim's speech might have on the defendant's sentence.

As the preceding discussion indicates, the victim's right to be reasonably heard at sentencing proceedings serves a variety of goals. While victim allocution can fulfill a utilitarian function by impacting the defendant's sentence, the practice also serves to honor and acknowledge the victim's encounter with the defendant, as well as the victim's presence in the court system. Granting the victim the right to speak allows the victim to take a therapeutic step toward healing from the defendant's wrongful acts and establishing a new moral balance between the two individuals. Likewise, the practice serves to educate the defendant as to the broader consequences of his criminal choices. Hence, the transformative nature of the rite of allocution is emphasized.

However, when one compares the victim's right to allocution under the CVRA with the defendant's comparable right, the theories underlying the two practices do not entirely square with one another. As the next Part discusses in greater depth, the defendant's right to allocate is grounded largely in the assumption that what the defendant has to say could lessen his sentence. In essence, defendant allocution is driven by its mitigating effects, rather than by considerations of the ritualistic benefits that may exist in the practice. The differences between victim and defendant allocution are evident not only in how modern courts tend to receive defendant allocution statements, but also in how defendant allocution denials are reviewed and corrected.122

III. DEFENDANT ALLOCUTION

A. The Common Law History of Defendant Allocution

In contrast to the relatively modern history of victim allocation, the defendant's right to allocate at sentencing has been an integral part of the criminal justice system for centuries,123 but has not been subject to extensive judicial or scholarly attention. English case law dating from as early as 1689 discusses de-

122. See infra Section III.C.
fendant allocution with limited fanfare, as do legal commentators from the nineteenth century. Modern courts tend to provide only a basic explanation of what is entailed in a defendant’s right to allocute and do not engage in extensive discussions as to its history, or of its transformation from its common law uses to its contemporary applications.

At English common law, courts were required to ask a defendant who was found guilty of a capital felony or treason charge whether there was any reason judgment should not be pronounced against him. The defendant could raise a limited number of legal arguments in response, and this brief exchange between the defendant and the judge often represented the defendant’s only opportunity to express his views.


125. 5 RONALD A. ANDERSON, WHARTON’S CRIMINAL LAW AND PROCEDURE 376 (12th ed. 1957); 1 J.F. ARCHBOLD, A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE 577 (New York, Banks & Brothers 8th ed. 1877); 2 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE 1129-30 (2d ed. 1913); 4 WILLIAM BLACKSTONE, COMMENTARIES *375; 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *700 (Springfield, G. and C. Merriam 1841); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 471 (photo. reprint 1996) (1883).

126. One must carefully cull justifications for the right’s existence from court rulings. Likewise, only a limited body of scholarship exists that studies the defendant’s allocution right. Paul W. Barrett’s work, Allocution, published over sixty years ago, serves as the most comprehensive examination of defendant allocution in England and the United States. Barrett, supra note 123. Professor Barrett’s study focused primarily on the history of the use of defendant allocution in American state courts, but did not devote much attention to the question of why the right exists in modern practice.

Since Professor Barrett’s work, defendant allocution has received only selective treatment from scholars and practitioners. See Alexandra Natapoff, Speechless: The Silencing of Criminal Defendants, 80 N.Y.U. L. REV. 1449 (2005) (advocating for more defendant speech, including allocution, during the criminal process); O’Neill, supra note 123, at 1178-80 (arguing for broader allocution rights for defendants in capital trials); Marshall, supra note 123, at 209-10 (raising questions about the usefulness of defendant allocution); Myers, supra note 123, at 798-99 (arguing for broader allocution rights for defendants in capital trials); A.G. Barnett, Annotation, Necessity and Sufficiency of Question to Defendant as to Whether He Has Anything To Say Why Sentence Should Not Be Pronounced Against Him, 96 A.L.R.2d 1292 (1964). Recently, however, and as referenced earlier, Professor Thomas has made a valuable contribution to the discourse regarding defendant allocution by engaging in a thoughtful study regarding modern justifications for the right. See Thomas, supra note 57, at 2645-47.

127. See ANDERSON, supra note 125, at 376; ARCHBOLD, supra note 125, at 577; BISHOP, supra note 125, at 1129; Barrett, supra note 123, at 115; Thomas, supra note 57, at 2646.
to be heard by the court. Unlike in modern American practice, common law criminal defendants were not guaranteed the right to counsel and were denied the right to speak on their own behalf. Allocation therefore often served as the sole means for a defendant personally to present the court with legal defenses or mitigating evidence in answer to the charge against him. Without a right to allocation, the defendant might be sentenced to death without ever having the opportunity to speak to the court. Hence, it was generally accepted that a defendant's right to speak prior to being sentenced was indispensable, the denial of which required voiding the judgment, and in more modern practice, resentencing.

Over time, the English practice of defendant allocution evolved. Defendants were no longer limited to raising a particular set of legal arguments to escape judgment; instead, courts granted them the general opportunity to plead for mercy. Concurrently, in American courts, defendants possessed the added advantage of the guarantee of assistance of counsel and the opportunity to speak on their own behalf at trial. Likewise, far fewer crimes were subject to the punishment of death. In light of these changes, the original reasons for de-

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129. See Green v. United States, 365 U.S. 301, 304 (1961); Robalewski v. Superior Court, 197 A.2d 751, 753 (R.I. 1964) (noting that at common law, a defendant did not have the right to counsel upon a not guilty plea as to issues of fact in felony and treason cases); Barnett, supra note 126, § 3, at 1295. But see Barrett, supra note 123, at 122-23 & nn.39, 39a (discussing Rex v. Royce, (1767) 98 Eng. Rep. 81 (K.B.), in which the defendant was represented by counsel).

130. See Thomas, supra note 57, at 2649, 2655-56.

131. Unlike in modern American legal practice, where the death penalty is available only for homicides, at English common law the punishment of death was applicable to all crimes except petty larceny and mayhem. See Stephen, supra note 125, at 487.

132. See Dawson, supra note 128, at 117-18; see also infra Section III.C (discussing how defendant allocation errors are generally corrected). For a discussion regarding the historic requirement to void the judgment against the defendant and resentence him when he was denied the right to allocute, see Anderson, supra note 125, at 376; Bishop, supra note 125, at 1130; Blackstone, supra note 125, at *375; and Barrett, supra note 123, at 117-121.

133. See Archbold, supra note 125, at 577; Bishop, supra note 125, at 1129; Chitty, supra note 125, at *700; Nat'l Council on Crime and Delinquency, Guides for Sentencing 43 (2d ed. 1974) [hereinafter Nat'l Council]; Barrett, supra note 123, at 124-140.

134. U.S. Const. amend. VI.

defendant allocution no longer apply. Appointed or retained counsel can fulfill the goals of common-law allocution by making arguments at trial and at sentencing, by challenging information contained in pre-sentence reports, and by filing post-judgment appeals. Commentators, therefore, have questioned whether the right has turned into an “idle ceremony” and “ancient formality” whose purposes are better fulfilled by modern procedural practice.

In its primary opinion on defendant allocution, Green v. United States, the Supreme Court recognized that the original justifications for a defendant’s common-law right of allocution have waned. Charting the history of the right, the Court commented that it was “not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century.” Nonetheless, the Court stated that

we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of [the] modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.

The Court went on to affirm the importance of the sentencing right, holding that it included two components, the defendant’s right to speak on his own behalf, and his right to present information in mitigation of his punishment. The first of these components implicates a rite-based approach to allocution, while the latter focuses more on whether the defendant’s statement was relevant to, or capable of, mitigating his sentence. To the extent that courts have examined the defendant’s allocation right, the mitigation or relevancy approach predominates, both in how courts discuss the right, as well as when they allow for resentencing in the face of denial of the right.

136. See Thomas, supra note 57, at 2649.
137. See, e.g., Barrett, supra note 123, at 124; Dawson, supra note 128, at 118; Barnett, supra note 126, § 3, at 1295.
139. Id. at 304.
140. Id.
141. Id.
142. See Thomas, supra note 57, at 2643-44, 2655-57.
B. The Modern Practice of Defendant Allocution

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

The defendant's right to allocute is currently detailed in Rule 32 of the Federal Rules of Criminal Procedure. The rule states that "before imposing sentence, the court must ... address the defendant personally in order to permit ..." 143

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144. This study also contains the occasional reference to relevant state court decisions.

145. Professor Thomas identifies this prevailing theory in her article, Thomas, supra note 57, at 2655, and I will refer to it frequently throughout this Section. While similar to my proffered relevancy approach for victim allocution, I believe Professor Thomas’s “mitigation” theory provides a more appropriate title for the prominent theory supporting defendant allocution. Stemming directly from the Court's language in *Green*, 365 U.S. at 304, as well as the language in Federal Rule of Criminal Procedure 32, see infra note 146, an explicit purpose of defendant allocution is to permit the defendant to present information to the court to mitigate his sentence. Conversely, I draw a slightly wider net when I identify relevancy as one of the major theories for victim allocution. The cases do not discuss victim allocution in terms of its mitigation or aggravation purposes, but rather discuss the practice, in part, in terms of its general relevancy. While it is certainly possible that a victim may provide the sentencing court with information to mitigate the defendant's sentence, this will not always be the case. Similarly, victim allocution is not always intended to aggravate the defendant's sentence either.

As I discussed earlier in this paper, victim allocution may be described, in part, in terms of a relevancy theory. However, describing defendant allocution in terms of relevancy slightly overreaches. As Professor Thomas aptly notes, the practice appears to exist primarily because of its mitigating power on a defendant's sentence. Thomas, supra note 57, at 2643-44, 2655-57. Hence, I discuss defendant allocution as predominantly explained by a mitigation theory, while acknowledging that my relevancy theory for victim allocution runs along a parallel but distinct path.
the defendant to speak or present any information to mitigate the sentence.'\(^{146}\)

Following the Court's decision in *Green*, the federal appellate courts have been emphatic that Rule 32 be applied "quite literally."\(^{47}\) Conversations between the court and defense counsel are not sufficient to satisfy the right.\(^{148}\) Instead, it must be evident to all involved, especially the defendant, that he is permitted to speak to the court prior to the pronouncement of his sentence.\(^{149}\) The sentencing judge, in turn, is required to listen carefully to what the defendant has to say.\(^{150}\) By requiring the sentencing judge to listen with care to the defendant's statement, courts emphasize that the defendant's opportunity for allocution should not be viewed as an empty ritual, but rather as a vital and integral part of the sentencing process.\(^{51}\) Hearing from the defendant, therefore, matters. In defining what matters however, courts generally focus on the mitigating influence the defendant's speech may have on his sentence.\(^{52}\)

Courts appear willing to hear from remorseful and apologetic defendants, but are quick to cut off defendants who use their allocution right to reargue

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


150. *United States v. Mack*, 200 F.3d 653, 658 (9th Cir. 2000); *United States v. Li*, 115 F.3d 125, 133 (2d Cir. 1997); *United States v. Sarno*, 73 F.3d 1470, 1503-04 (9th Cir. 1995); *Pelaez*, 930 F.2d at 524; *United States v. Sparrow*, 673 F.2d 862, 865 (5th Cir. 1982).

151. *United States v. Riascos-Suarez*, 73 F.3d 616, 627 (6th Cir. 1996); *United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991); *United States v. Serhant*, 740 F.2d 548, 554 (7th Cir. 1984); *Sparrow*, 673 F.2d at 865.

152. See *Thomas*, *supra* note 57, at 2655-57.
their case; to challenge the court, judicial system, or government; or to continue to protest their innocence. For example, in *United States v. Burgos-Andujar*, the court exhibited the judicial predisposition toward hearing only from remorseful defendants. There, the defendant, a legislator in the Puerto Rican Senate, was found guilty of criminal trespass in United States naval territory. She, along with others, had protested military exercises on a local island. The defendant was afforded her right to allocute, through which she claimed her innocence and challenged the court’s authority as well as the evidence it relied upon in finding her guilty. As a result of the defendant’s allocution, the judge raised her sentence from that which the court had originally contemplated. On appeal, the reviewing court acknowledged that a sentencing court must provide the defendant with an opportunity to present “any information in mitigation of sentence,” and permit “the defendant to speak on all topics which the defendant considers relevant.” The court also determined that the defendant was afforded this right. However, as noted by the appellate court, the defendant’s allocution did not have the desired effect of reducing her sentence. The defendant essentially declared herself innocent of crime and thus refus[ed] to acknowledge the impact of her illegal action. [S]he [also] disparaged the validity of the law she broke, accusing the United States Navy of breaking the “greater law.” Her statements certainly suggest a lack of remorse, an attempt to avoid responsibility for her actions, and even a likelihood of repeating her illegal actions. Any of these reasons may have legitimately led the sentencing judge to increase appellant’s sentence.

Similarly, *United States v. Mitchell* displayed courts’ distaste for defiant defendants who challenge the legal system. In *Mitchell*, the defendant was found guilty of failing to report for military duty. The appellate court described his speech before the sentencing court as an intemperate harangue concerning his personal views on moral questions. It went far beyond the bounds of propriety; it was of matters in

153. See United States v. Muniz, 1 F.3d 1018, 1025 (10th Cir. 1993).
154. 275 F.3d 23 (1st Cir. 2001).
155. Id. at 26-27.
156. Id. at 27.
157. Id.
158. Id. at 28-29.
159. Id. at 30; see also Natapoff, supra note 126, at 1457-69 (discussing how a defendant’s attempt to explain his actions to the court can be misinterpreted as claiming innocence); Thomas, supra note 57, at 2661-66 (commenting that allocution statements of innocence or defiance are not well received by courts).
160. 392 F.2d 214 (2d Cir. 1968).
no way relevant to the prosecution and far exceeded his right of allocu-
tion, a right to make a statement on his own behalf or in mitigation of
punishment. . . .

. . .

Allocation does not grant a defendant the right to enter into a dia-


tribute of the sentencing Judge, or of the Court, or the judicial system of
which he is a part.161

Mitchell and Burgos-Andujar do not only display courts’ distaste for anything
but a remorseful apology from the defendant, but they also highlight the con-
tinued prevalence of the mitigation theory underlying defendant allocution.
Courts are interested in hearing from a defendant if what he has to say might
lessen his sentence. Otherwise, the message is that defendants best stay quiet lest
they risk adversely impacting their sentences.

The dominance of a mitigation-based theory for defendant allocution is not
entirely without reason.162 By focusing on whether there are grounds upon
which a court might reduce a defendant's sentence, the practice serves both the
defendant and the sentencing judge.163 The defendant is provided with a final
opportunity to attempt to make a difference to his sentence, whether through
pleas of mercy164 or statements that would allow the court to ensure that the
sentence is specific and appropriate to the defendant.165 Likewise, the judge is
afforded

the opportunity to evaluate the total person who stands at the bar of
justice: to note the physical appearance and demeanor; the tone, tem-
per and rhythm of speech; the facial expressions, the hands, the reveal-
ing look into the eyes. In sum, [without allocution, the judge is de-

161. Id. at 215-16; see also United States v. Mack, 200 F.3d 653, 658 (9th Cir. 2000) (de-
ciding that the court did not deny the defendants’ right to allocution where the
court asked that the defendants not discuss their motives, philosophies, and be-


lifs on issues that did not pertain to mitigating their sentence); United States v.
Kellogg, 955 F.2d 1244, 1250 (9th Cir. 1992) (deciding that the court did not violate
the defendant’s right to allocution where it interrupted the defendant during his
discussion of “giant loopholes” which exist in the tax laws and his opinion that
the IRS was incompetent).

162. See Thomas, supra note 57, at 2655-57.


164. See, e.g., United States v. Prouty, 303 F.3d 1249, 1251 (11th Cir. 2002); United States
v. Quintana, 300 F.3d 1227, 1231 (11th Cir. 2002); Burgos-Andujar, 275 F.3d at 28-29;
United States v. Dabeit, 231 F.3d 979, 981 (5th Cir. 2000) (per curiam); United
States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994); United States v. Barnes, 948
F.2d 325, 328 (7th Cir. 1991); Nat’l Council, supra note 133, at 43.

165. Quintana, 300 F.3d at 1231; United States v. Adams, 252 F.3d 276, 287 (3d Cir.
2001); United States v. Tamayo, 86 F.3d 1514, 1518 (11th Cir. 1996); De Alba Pagan,
33 F.3d at 129; Barnes, 948 F.2d at 328.
prived of] those impressions gleaned through the senses in any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another.166

The predominance of the mitigation theory is equally evident in how courts review allegations of the denial of a defendant’s right to allocate.167

C. The Correction of Defendant Allocution Denials

The majority of federal appellate courts reviewing denials of defendant allocution apply an analysis guided by Federal Rule of Criminal Procedure 52.168 Rule 52 details the standards of review for direct appeal in the federal courts. It commands that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded,”169 and that “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”170

While most federal appellate courts employ a Rule 52 analysis for reviewing defendant allocution denials, one must note the curious fact that the Supreme Court, in addressing defendant allocution denials in its decisions in Green v. United States,171 Hill v. United States,172 and Van Hook v. United States,173 made no reference to Rule 52. The Court’s silence regarding Rule 52 may have been based on its understanding that the rule did not categorically apply to all trial or sentencing errors, and that therefore, a reversible-error approach was appropriate for allocution denials.174 At the time of the Green, Hill, and Van Hook decisions, the law was unsettled as to whether Rule 52 applied to all claimed errors,

167. See Thomas, supra note 57, at 2656-57.
168. See United States v. Griggs, 431 F.3d 1110, 1114 (8th Cir. 2005); United States v. Gunning, 401 F.3d 1145, 1147 (9th Cir. 2005); United States v. Reyna, 358 F.3d 344, 347-50 (5th Cir. 2004); United States v. Quintana, 300 F.3d 1227, 1231-32 (11th Cir. 2002); United States v. Adams, 252 F.3d 276, 284 (3d Cir. 2001); United States v. Lewis, 10 F.3d 1086, 1092 (4th Cir. 1993); see also United States v. Riascos-Suarez, 73 F.3d 616, 627 (6th Cir. 1996) (invoking a reversible error standard of review but relying upon cases that apply a Rule 52 plain-error or harmless-error standard of review). But see infra notes 222-229 and accompanying text (discussing the courts that review defendant allocution denials under a reversible-error approach).
170. Fed. R. Crim. P. 52(b) (plain error).
171. 365 U.S. 301 (1961).
174. See United States v. Reyna, 358 F.3d 344, 349-50 (5th Cir. 2004) (speculating as to why the Supreme Court did not discuss Rule 52 in its key allocution cases); United States v. Adams, 252 F.3d 276, 281-83 (3d Cir. 2001) (same).
or whether there existed a subset of errors requiring automatic reversal or re-
mand. However, in its 1993 decision of United States v. Olano, the Supreme
Court strongly implied that Rule 52 was the appropriate means by which to cor-
rect all trial and sentencing errors. The Court’s subsequent opinion in John-
son v. United States solidified this position. The appellate courts that apply a
Rule 52 standard of review to defendant allocution denials imply that, in con-
junction with the Supreme Court’s evolving jurisprudence regarding Rule 52,
allocution errors should be brought within the rule’s ambit. The manner in
which courts apply Rule 52 to allocution denials varies, however.

1. The Rule 52 Question of Prejudice

A Rule 52 inquiry asks whether the claimed error affected the defendant’s
substantial rights. In addressing this question, courts examine whether the error
affected the outcome of the trial court’s proceedings in a manner prejudicial to
the defendant. Several courts have been reluctant to cast the prejudice net too
broadly, holding that if a defendant is sentenced at the lowest end of the appli-
cable Sentencing Guideline range, and he or his lawyers did not make any ar-
guments to the court warranting a departure from the range, then the defen-

175. Reyna, 358 F.3d at 349-50; Adams, 252 F.3d at 283.
176. See 507 U.S. 725, 731-33 (1993) (“Rule 52(b) defines a single category of forfeited,
but reversible error.”).
177. See 520 U.S. 461, 466 (1997). Both Olano and Johnson dealt with questions arising
under Rule 52(b)’s plain-error analysis, but there is little question that when re-
viewing timely raised errors, Rule 52(a) applies. See Neder v. United States, 527
U.S. 1, 7 (1999); Bank of N.S. v. United States, 487 U.S. 250, 255 (1988); United
States v. Lane, 474 U.S. 438, 448 n.11 (1986). The only exception to the default ap-
plication of harmless-error or plain-error review arises in the context of “struc-
tural errors.” See Neder, 527 U.S. at 7-8; Johnson, 520 U.S. at 468-69. Structural er-
ors occur where the defendant is completely denied the assistance of counsel or
the right to self-representation, where a biased judge oversees the proceedings,
where the grand jury selection is influenced by racial discrimination, where the
defendant is denied a public trial, or where a defective reasonable-doubt instruc-
tion is given to the jury. Johnson, 520 U.S. at 468-69.
178. See Reyna, 358 F.3d at 350 (“[D]ecisions from the Supreme Court strictly applying
Rule 52 regardless of the seriousness of the claimed error lead us to conclude that
we should reexamine [our position] that on direct appeal the defendant is auto-
matically entitled to re-sentencing when he is not afforded his right of allocation
[and instead employ Rule 52].”); Adams, 252 F.3d at 283-84 (same). Other courts,
without engaging in a significant analysis of the issue, appear to agree. See, e.g.,
United States v. Mack, 200 F.3d 653, 657 (9th Cir. 2000); United States v. Cole, 27
F.3d 996, 998 (4th Cir. 1994).
179. Olano, 507 U.S. at 734; Adams, 252 F.3d at 285.
rant was not prejudiced by the denial of his allocution right. These courts reason that if the defendant received the lowest sentence possible despite not having the opportunity to allocute, the denial of the right made no difference to his sentence, and hence there was no prejudice. In essence, the lack of defendant allocution in such cases does not matter because it could not mitigate the sentence.

Conversely, the Ninth Circuit has ruled that denial of a defendant's allocution right is presumed prejudicial if there is any possibility, no matter how remote, that had the defendant been permitted to speak, the court might have granted a lower sentence.

This standard applies even if the defendant was sentenced at the bottom of the appropriate Sentencing Guideline range, and even if the defendant or his attorney had already raised during the sentencing proceedings the issues that the defendant would have addressed in his allocution.

The United States v. Riascos-Suarez, 73 F.3d 616, 627-28 (6th Cir. 1996) (remanding the case for resentencing where the defendant was denied the opportunity to allocute and did not receive the shortest sentence allowed by statute); United States v. Lewis, 10 F.3d 1086, 1092 (4th Cir. 1993) (finding that the defendant did not suffer prejudice when he received the lowest sentence possible); United States v. Mejia, 953 F.2d 461, 468 (9th Cir. 1991) (same), abrogated on other grounds recognized by United States v. Caperna, 251 F.3d 827 (9th Cir. 2001).

This argument may be undercut somewhat by the increased discretion now afforded to judges under United States v. Booker, 543 U.S. 320 (2005). Prior to the Supreme Court's decision in Booker, a defendant's ability to seek flexibility or alter his sentence under the U.S. Sentencing Guidelines was limited. However, by moving away from a mandatory application of the Guidelines as directed by Booker, defendants may have far more room to argue for, and receive, sentences that fall outside a prescribed sentencing range. From a mitigating perspective, defendant allocution may "matter" far more in a post-Booker world. Even if a defendant is sentenced at the bottom of a Guideline range, there is always the chance that the court could have departed downward. Thomas, supra note 57, at 2653-55.

The Eleventh Circuit has adopted this same general approach, claiming remand for re-sentencing is appropriate only where the defendant has suffered "manifest injustice." See, e.g., United States v. Prouty, 303 F.3d 1249, 1253 (11th Cir. 2002); United States v. Quintana, 300 F.3d 1227, 1231-32 (11th Cir. 2002); United States v. Gerrow, 232 F.3d 831, 834 (11th Cir. 2000); United States v. Ramsdale, 179 F.3d 1320, 1324 (11th Cir. 1999); United States v. Rodriguez-Velasquez, 132 F.3d 698, 700 (11th Cir. 1998). Manifest injustice arises when the defendant did not receive the lowest possible sentence within his Guideline range. See Quintana, 300 F.3d at 1232; Gerrow, 232 F.3d at 834; Rodriguez-Velasquez, 132 F.3d at 700.

It must be noted that the Ninth Circuit varies the most, as compared to other federal courts, in its expression and application of standards of review for defendant allocution errors. As referenced above, in Mejia, the court ruled that where a defendant received the lowest sentence possible, he could not claim prejudice from the denial of his right to allocute. 953 F.2d 461; see supra note 180 and accompanying text. Mejia directly contradicts United States v. Medrano, where the court ar-
EQUAL RIGHTS FOR EQUAL RITES

Ninth Circuit's broad approach closely resembles the reversible-error review for correcting defendant allocation errors that is applied by a minority of courts. While focusing on whether the lack of allocation impacted the defendant's sentence, the Ninth Circuit implies that unless a defendant received the statutory mandatory minimum sentence for his crime, the denial of allocation should always be corrected.

2. Rule 52 Plain Error

Even if a court determines that a defendant was prejudiced by the denial of his right to allocute, a remedy is not guaranteed if the court is proceeding under a plain-error analysis. Under this analysis, a court can exercise its discretion and decline to correct an error raised in an untimely manner by a defendant. As guided by the Court in United States v. Olano, correction should only occur when the error (1) is plain, (2) affects the defendant's substantial rights, and (3) "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." How courts approach the final prong of a plain-error analysis has varied. Some courts have concluded that once they determine that the error prejudiced the defendant or affected his substantial rights, the error must be corrected because defendant allocation "is the type of important safeguard that helps assure the fairness, and hence legitimacy, of the sentencing process." Without allocation, the court denies the defendant the right to serve as his "most persuasive and eloquent advocate," and the court is likewise denied the opportunity to "take into consideration [the defendant's] unique perspective on the circumstances relevant to his sentence, delivered by his own voice." Therefore, some courts show little hesitation in concluding that the denial of allocution is a serious error that warrants correction.

This approach hints that perhaps there may be something more to defendant allocution than merely mitigating the defendant's sentence. Hearing from the defendant is valuable, not only because it may impact his sentence, but also because the equity of the proceeding is enhanced by ensuring that the court hears from the defendant prior to pronouncing punishment. Echoing some-

ticated a broad presumed-prejudice standard. 5 F.3d 1214; see supra note 183 and accompanying text.

185. See infra notes 222-229.
188. Adams, 252 F.3d at 288.
189. Id.
190. Id.
191. See, e.g., United States v. Cole, 27 F.3d 996, 999 (4th Cir. 1994) ("When a defendant was unable to address the court before being sentenced and the possibility
thing akin to the rite-based approach to victim allocution, this view of defendant allocution suggests that there is something inherently important about the practice that should not be denied to the defendant. This approach, however, has not been universally accepted. Some courts are hesitant to conclude that the prejudice arising from the denial of the defendant’s right to allocate is so serious as to implicate the fairness or integrity of the judicial proceedings. For these courts, there may be circumstances where a careful search of the trial record indicates that despite the allocation error, the integrity of the sentencing proceeding remained intact. Therefore, even if a defendant is prejudiced by the denial of his allocation rights, courts adopting this alternative review for the practice deny the defendant a remedy.

IV. Equal Rights for Equal Rites?

The preceding sections reveal that, in many respects, victim allocution under the CVRA bears only a limited relation to defendant allocution under Rule 32. In contrast to defendant allocution, which is valued for its mitigating effects on a defendant’s sentence and enforced primarily when it can be shown that the denial of the right impacted the defendant’s sentence, victim allocution is encouraged not only because it may be relevant to the determination of the defendant’s sentence, but also because of the ritualistic and transformative values inherent in the right. Moreover, the manner in which courts determine when denial of an allocation right should be corrected indicates a preference to cor-

remains that an exercise of the right of allocation could have led to a sentence less than that received, we are of the firm opinion that fairness and integrity of the court proceedings would be brought into serious disrepute were we to allow the sentence to stand.”); see also United States v. Prouty, 303 F.3d 1249, 1253 (11th Cir. 2002) (“Because allocution plays a central role in the sentencing process, the denial of this right is ‘not the sort of ‘isolat[ed]’ or ‘abstract’ error that does not impact the ‘fairness, integrity or public reputation of judicial proceedings.”’ (alteration in original) (quoting United States v. Young, 470 U.S. 1, 15-16 (1985))).

192. See United States v. Reyna, 358 F.3d 344, 352 (5th Cir. 2004) (“We decline to adopt a blanket rule that once prejudice is found . . . the error invariably requires correction.”).

193. Id.

194. Id. at 353. For example, in United States v. Reyna, the court declined to correct an allocution denial where the defendant had made several appearances before the court for violations of his supervised release. Id. at 352. At his second appearance before the court, the judge clearly informed the defendant of what his sentence would be if he again violated his release terms. Id. at 352–53. The defendant had already been given the opportunity to allocute at his original sentencing and again when he was resentenced upon his first violation of supervised release. Id. When the defendant violated the terms of his supervised release a second time, the judge sentenced the defendant to the terms the court set out at the earlier proceeding and did not grant the defendant his allocution right. Id. at 352. Under these circumstances, the appellate court declined to correct the error. Id. at 353.
rect victim allocution denials over defendant allocution denials. In light of the different goals supporting the two practices, as well as the varying standards by which they are enforced, one must question whether the invocation of defendant allocution as a model for victim allocution bears much weight. Additionally, one must question whether the imbalance between victim and defendant allocution rights should be adjusted, and if so, in what manner.

A. Maintaining the Status Quo?

One could argue that there is no reason to equate victim and defendant allocution. While on the surface both practices involve the ritual of an individual presenting his or her views before the court, the underlying theories for each practice differ. In light of the different justifications for the practices, it may be entirely appropriate that victim allocution and defendant allocution are not matched. While victim and defendant allocution may share a common form and name, they could simply be apples and oranges that find themselves in the same fruit basket but share no other commonalities.

However, in acknowledging the incongruities between the two practices, one cannot then ignore the mantra of victims’ rights advocates and courts examining victim allocution, which declares that the victim’s right to be heard at sentencing should be equal to the right provided to defendants.195 As noted earlier in this piece, the equal rights argument often raised by advocates to further the advancement of victims’ rights has been highly effective.196 And despite some of the acknowledged weaknesses of the equal rights argument,197 it cannot be wholly discounted. At its base, it embodies an understanding that crime should not be reduced simply to a contest between a defendant and the state. In an attempt to render impartial justice, injustice may result when a victim’s interests in the proceedings against her offender are ignored, sidelined, or treated as secondary by the prosecution, the defense, and the court. As articulated by one victim, “Why didn’t anyone consult me? I was the one who was kidnapped, not the State of Virginia.”198 Crime is indeed relational in that it represents a breach of social trust in a number of different relationships—the offender and the victim, the offender and his community, and the offender and our structured system of government.199 Promoting greater equality within the criminal

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

196. See supra notes 19-28 and accompanying text.

197. See supra notes 29-36 and accompanying text.


199. See supra notes 91-93 and accompanying text.
justice process by recognizing and balancing these different interests is an im-
portant way to acknowledge the relational aspects of crime.

However, if the victims’ rights advocates continue to employ an equal
rights argument as a means to further their cause, they must be honest and fair
in doing so. Failure in this regard undermines victims’ rights advocates’ effec-
tiveness and ability to bring about the genuine reforms needed in the criminal
justice system. Therefore, we should not ignore the imbalance that exists be-
tween victim and defendant allocution. The question then follows as to what
balance should be created between the two practices.

B. Narrowing Victim Allocution?

To the extent victims’ and defendants’ rights should be equalized and bal-
anced, the victim’s allocution right could be pulled back and aligned more
closely with the defendant’s allocution right. Of course, such an argument is
unlikely to sit well with victims’ rights advocates. Curtailing victim allocution to
a realm of relevancy would return the victim to the role of witness for the gov-
ernment’s case, thereby undermining the victim’s status under the CVRA as an
independent participant.200 Similarly, a narrower approach to victim allocution
would limit when the denial of the right could be corrected. As discussed ear-
lier, provided that a victim has complied with the CVRA’s procedural require-
ments, case law indicates that a court’s denial of the victim’s right to be rea-
sonably heard at sentencing must be corrected.201 However, if victim allocution
were treated in the same way that the majority of courts treat defendant allocu-
tion, a victim would lose the “indefeasible” right to speak,202 and would instead
possess only the chance to speak as deemed relevant by a court, or where the
victim was prejudiced by the denial of the right to allocute.203

Viewing victim allocution solely through the lens of relevancy and preju-
dice is problematic. First, while victims may have obtained the status of “inde-
pendent participants” in the sentencing process under the CVRA, this position
does not make them full parties in the proceeding who possess enforceable in-
terests in the ultimate outcome of the proceedings, whether in terms of a verdict
or a specific sentence.204 Even if a victim was displeased with the defendant’s
sentence or believed she had relevant information to share with the court that
could impact the defendant’s sentence, the victim lacks a cognizable and en-
forceable interest in the sentencing outcome. To analyze victim allocution deni-

200. See supra notes 58–61 and accompanying text.
201. See supra notes 42–50, 114–121, and accompanying text.
203. In this regard, my relevancy theory comes its closest to Professor Thomas’s miti-
gation approach to defendant allocution. See Thomas, supra note 57, at 2643–44,
2649–53.
204. See supra notes 42–50.
als in light of relevancy or prejudice to the sentencing outcome is therefore misplaced.

Second, a relevancy-based review of victim allocution errors invokes the often-inaccurate dichotomy of the innocent and vengeful victim seeking a harsh punishment for the reprehensible defendant.\textsuperscript{205} Contrary to this image, there are circumstances at sentencing where victims express statements of mercy, forgiveness, or hope for the defendant’s rehabilitation.\textsuperscript{206} Hence, a victim’s statement could indeed be relevant to the defendant’s sentence, but could mitigate rather than aggravate the court’s calculation of the defendant’s punishment. If a victim’s statement could either increase or decrease the defendant’s sentence, then every failure of a court to hear from the victim could potentially affect the defendant’s punishment, and would thus always warrant resentencing. Therefore, it would be difficult to administer a standard of review that requires calculating whether the victim’s statement would have impacted the defendant’s sentence. Instead, a standard of review more aligned to a reversible-error standard would appear better suited to the denial of a victim’s allocution right, if only from an efficiency standpoint.

Finally, limiting victim allocution to a relevancy theory undermines the other important goals the practice seeks to advance. It would be difficult to base the correction of victim allocution errors on prejudice to the victim based on his lost opportunity to restore his dignity or educate the defendant.\textsuperscript{207} How does one calculate the prejudice that arises when a victim is denied the opportunity for empowerment or the chance to “look [the] defendant in the eye and let him know the suffering his misconduct has caused”?\textsuperscript{208} Again, a reversible-error standard would more adeptly address these harms, which indeed is the approach that courts applying the CVRA appear to have adopted.\textsuperscript{209} To approach victim allocution otherwise would thwart the dignitary, cathartic, and participatory components of the practice, which many victims deem just as valuable as the ability to make a calculable, and presumably negative, impact on the defendant’s sentence.\textsuperscript{210} Consequently, narrowing victim allocution is an inappropriate response.

\textsuperscript{205} See supra notes 30-34 and accompanying text.

\textsuperscript{206} Bibas & Bierschbach, supra note 60, at 137; Bierschbach, supra note 11, at 47; Erez, supra note 18, at 497-98; Karmen, supra note 60, at 162; Tobolowsky, supra note 14, at 84-85.

\textsuperscript{207} See supra notes 120-121.

\textsuperscript{208} Kenna v. U.S. Dist. Court (Kenna I), 435 F.3d 1011, 1017 (9th Cir. 2006).

\textsuperscript{209} See supra Section II.D.

\textsuperscript{210} The empirical studies regarding victim perceptions of the value or worth of their impact or allocution statements, as well as victims’ participation at sentencing, are mixed. Older studies indicate that victim satisfaction was often predicated by victims’ perception that their participation made a difference to the case. See Tobolowsky, supra note 14, at 89. However, more recent studies indicate otherwise. See, e.g., Barnard, supra note 56, at 76; O’Hara, supra note 29, at 241. Professor
C. Broadening Defendant Allocution

Instead, the scope and basis for defendant allocution should be brought up to par with victim allocution. While the two practices currently appear to serve different goals and purposes, they could be designed to share similar objectives. Like victim allocution, defendant allocution could be advanced not only for its relevancy or mitigating functions, but also for its ability to transform the defendant through the ritualistic nature of the practice.

1. Limits to a Mitigation/Relevancy Theory for Defendant Allocution

There are sound reasons to look beyond a mitigation or relevancy theory to support defendant allocution. Despite courts' relative reliance upon the mitigation theory, the approach has its limits.\(^{211}\) It is not always the case that what a defendant says at sentencing can or will matter to his sentence.\(^{212}\) For example, when a defendant is faced with a statutory mandatory minimum sentence, anything he says in an attempt to reduce his sentence is futile and irrelevant.\(^{213}\) Similarly, if obtaining a lower sentence really is the sole purpose of defendant allocution, one must question whether defense counsel could easily, if not more efficiently and effectively, fulfill this goal, thereby extinguishing the need to hear from the defendant altogether.\(^{214}\) Anything a defendant might say could be deemed cumulative and irrelevant to the arguments already made by his attor-

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Erez notes that victims are not as interested in changing sentencing outcomes as they are in participating at sentencing. Erez, supra note 18, at 491-92. Victim satisfaction with the criminal justice system is increased all the more where restorative justice practices, such as victim-offender mediation, are integrated into the standard aspects of criminal procedure. See, e.g., Bibas & Bierschbach, supra note 60, at 116-18, 131-33; Bierschbach, supra note 11, at 46; Erik Luna & Barton Poulson, Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker?, 37 McGeorge L. Rev. 787, 799-801 (2006).

\(^{211}\) See Thomas, supra note 57, at 2655-66.

\(^{212}\) Id. at 2657-59.

\(^{213}\) Id. at 2657-58.

\(^{214}\) Id. at 2658. Despite the Supreme Court's faith in the persuasiveness of defendants' "halting eloquence," Green v. United States, 365 U.S. 301, 304 (1961), an uneducated or unsophisticated defendant's allocution statement may often work against him due to his inability to "speak in the smooth, tutored jargon of professional remorse" often heard from better-educated or "savvy" defendants, Natapoff, supra note 126, at 1468. See also People v. Robbins, 755 P.2d 355, 371 (Cal. 1988) (Broussard, J., concurring) (expressing concern that a defendant's allocution statement in a capital case may work to his detriment where he is uneducated or inarticulate).
ney,\textsuperscript{215} giving weight to the argument that defendant allocution has become an empty formality.\textsuperscript{216}

It is difficult, however, to conceive of an American legal system that renders punishments without granting the party facing punishment one final opportunity to be heard. Even if a defendant has nothing legally substantial to add to the proceedings, most would agree that giving the defendant a final chance to speak is important. The defendant's voice adds an intangible but important “something” to the proceedings.\textsuperscript{217} Indeed, some courts have stated that defendants should have the “broad-ranging opportunity”\textsuperscript{218} to speak on “any subject of [their] choosing prior to the imposition of sentence.”\textsuperscript{219} Such an approach implies that the purpose of defendant allocution goes beyond merely impacting the defendant’s sentence. Rather, in his allocution statement, a defendant may share information with the court which, while not directly relevant or capable of mitigating his sentence, might fulfill other important goals such as providing a therapeutic outlet for the defendant\textsuperscript{220} and increasing the perceived and actual equity, legitimacy, and fairness of the sentencing proceeding.\textsuperscript{221} This alternative

\begin{itemize}
\item \textsuperscript{215} See Boardman v. Estelle, 957 F.2d 1523, 1530 (9th Cir. 1992) (deciding that error is harmless where the defendant is denied the right to allocute but what he would have stated was irrelevant or cumulative in light of statements made by defense counsel); Ashe v. North Carolina, 586 F.2d 334, 337 (4th Cir. 1978) (same).
\item \textsuperscript{216} See supra note 137.
\item \textsuperscript{217} See Natapoff, supra note 126, at 1465-69; Thomas, supra note 57, at 2659; see also Harris v. Maryland, 509 A.2d 120, 127 (Md. 1986) (“Most modern commentators strongly advocate retention of the right of allocution, recognizing that the practice in its present form serves a significant function no other procedural device can completely replace.”).
\item \textsuperscript{218} United States v. Myers, 150 F.3d 459, 462 (5th Cir. 1998).
\item \textsuperscript{219} United States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994). The defendant’s right to allocate, however, is not unlimited. Courts, especially those who adopt a mitigating approach to the practice, emphasize that the right is not wholly free from limitation. See United States v. Mack, 200 F.3d 653, 658 (9th Cir. 2000); United States v. Leasure, 122 F.3d 837, 840 (9th Cir. 1997); United States v. Muniz, 1 F.3d 1018, 1025 (10th Cir. 1993).
\item \textsuperscript{221} See, e.g., United States v. Quintana, 300 F.3d 1227, 1231 (11th Cir. 2002); United States v. Adams, 252 F.3d 276, 288 (3d Cir. 2001); United States v. Dabeit, 231 F.3d
\end{itemize}
view of defendant allocution is demonstrated by a scattered number of federal courts that evaluate denials of defendant allocution under a reversible-error standard.

2. Support for Broadening Defendant Allocution

As noted earlier, a majority of courts analyze defendant allocution denials under Rule 52 of the Federal Rules of Criminal Procedure.222 However, at least four circuits treat defendant allocution denials as reversible errors,223 basing this standard of review on Supreme Court precedent. In Hill v. United States,224 the Supreme Court cited to Van Hook v. United States,225 a decision the Court issued just a month after the Green ruling, in discussing how allocution errors should be reviewed and corrected. Van Hook was a two-sentence opinion that remanded a case for resentencing in light of a trial court’s failure to properly comply with Rule 32.226 Van Hook and Hill demonstrate that when a defendant is denied the right to allocute, the proper remedy is to remand the case for resentencing. Following suit, the lower courts initially began treating allocation denials as reversible error.227 However, and as referenced earlier in this piece, a

979, 981 (5th Cir. 2000) (per curiam); Myers, 150 F.3d at 463; De Alba Pagan, 33 F.3d at 129; United States v. Barnes, 948 F.2d 325, 328 (7th Cir. 1991); In re Shannon B., 27 Cal. Rptr. 2d at 804; LAFAYE, supra note 123, at 1231. In Chow, the Hawaii Court of Appeals stated:

[W]e regard allocution to be a significant aspect of the fair treatment which should be accorded a defendant in the sentencing process. The American Bar Association states that “the policies behind permitting the defendant to make a statement at sentencing have to do more with maximizing the perceived equity of the process than with detecting misinformation or obtaining a reliable impression of the defendant’s character.” We would disagree with the characterization that allocation is “perceived equity,” however, because we believe the defendant’s opportunity to speak on his disposition is, as a matter of fact, essential to fair treatment.

883 P.2d at 672 (citation omitted) (quoting AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE 18-459 (2d ed. 1980)).

222. See supra Section III.C.

223. See United States v. Archer, 70 F.3d 1149, 1151 (10th Cir. 1995); United States v. Axelrod, 48 F.3d 72, 72-73 (2d Cir. 1995); De Alba Pagan, 33 F.3d at 129-30; Barnes, 948 F.2d at 332.


226. Id. at 609.

227. See, e.g., 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); United States v. Phillips, 936 F.2d 1252, 1256 (11th Cir. 1991); United States v. Walker, 896 F.2d 295, 301 (8th Cir. 1990) (“It is now well settled that failure to comply with Rule 32(a)’s requirement
number of courts have shifted to a Rule 52 analysis for allocution denials. Nevertheless, a minority of courts still apply the sentencing approach indicated by the Court in *Hill* and *Van Hook*.229

The overriding theme drawn from the cases taking a reversible-error approach to defendant allocution is that the defendant's right to allocute is important not simply because it provides the defendant with an opportunity to impact, and presumably lower, his sentence. Of course, these courts do not discount the influence allocution may have on a defendant's sentence. However, because almost all sentencing decisions require courts to exercise some degree of discretion in their sentencing determinations,230 it is difficult to determine the extent to which a defendant's allocution statement might have altered his sentence if he had been permitted to speak. The reversible-error approach eliminates this guesswork. Denial of the right is presumed to matter in every case, and hence should always be corrected.

Beyond calculably affecting a defendant's sentence, courts employing a reversible-error approach also signal that defendant allocution should be enforced because of the inherent importance of the rite of allocution. These courts underscore that there is something discordant in allowing a judge to pronounce a sentence without hearing from the party being sentenced. The rite, and right, of allocution, is therefore enforced not only for the tangible impact it may have on a defendant's sentence, but also for its broader values and purposes.

3. The Rite of the Right

There is something distinctly ritualistic and ceremonial about a defendant standing before a court and speaking on his own behalf.231 In acknowledging

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228. See *supra* Section III.C.
229. See *supra* notes 224-226 and accompanying text.
230. The discretion of sentencing courts has been further increased since the Supreme Court's decision in *United States v. Booker*, 543 U.S. 320 (2005); see *supra* note 181 (referencing the impact *Booker* has had on federal sentencing practice).
231. It is here where the humanization model for defendant allocution, as proffered by Professor Thomas, is particularly apt. See Thomas, *supra* note 57, at 2645-47, 2666-69. As the title of her model suggests, Professor Thomas argues defendant allocution should not be limited to its mitigating role, but should also serve to humanize the defendant, by providing the court with a broader picture of the defendant and thereby ensuring that the punishment not only fits the crime, but also fits the defendant. *Id.* at 2644 & n.20. This humanizing function is furthered by the spe-
that the rite of allocution is inherent in the right of allocution, one may draw parallels from the rite-based goals of victim allocution—empowering the victim and educating the defendant—and correspondingly apply them to defendant allocution.

Practically speaking, and whether he likes it or not, the defendant is transformed by being a central player in the ritual of trial and sentencing. He shifts from being "the accused" to being either "the convicted" or "the exonerated." Apart from this legally imposed transformation, the defendant’s participation in the ritual of sentencing may bring about more nuanced but equally important changes in the defendant. Being acknowledged by the court and having the opportunity to "have his say" may therapeutically benefit the defendant in a manner valued by courts and commentators.233

Whether the defendant experiences catharsis through the act of apology,234 or empowerment through statements of innocence or defiance, the defendant is honored and dignified by being granted the opportunity to speak. As one state court commented:

Standing convicted of a crime, the defendant should be accorded the right to speak regardless of whether it will actually affect the sentence ultimately impose [sic]. While any statement the defendant may make might be “meaningless” in terms of the sentence to be received, we cannot say that the individual defendant would regard his or her remarks as meaningless.235

Through the rite of allocution, the defendant is also afforded a sense of dignity because the sentencing body must directly acknowledge him. The defendant is no longer passively silent, but becomes an active “participant in the public institution of the criminal justice system that directly affects his life.”235

Of course, defendants possess the right to testify on their own behalf during other parts of the trial, thereby raising the legitimate question of whether there is any need to broaden the defendant’s right to speak at sentencing. Certainly, in contrast to the victim, who cannot speak at trial unless called as a witness, the defendant has the right to have his voice heard during other parts of the crimi-

232. See supra note 220 and accompanying text.
233. See, e.g., Bibas & Bierschbach, supra note 60, at 90 (“Apology . . . is a powerful ritual for offenders, victims, and communities, one that criminal procedure could facilitate by encouraging offenders to interact face to face with their victims.”); see also id. at 141-45 (discussing the role of defendant apology at sentencing).
235. Thomas, supra note 57, at 2673; see also Harris v. Maryland, 509 A.2d 120, 127 (Md. 1986) (“[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.”).
nal proceedings. One could posit that the defendant has been provided two different opportunities for speech: (1) his opportunity to testify on his own behalf at trial, and (2) his “speech” through his unlawful acts against the victim and state. The defendant’s speech therefore should be limited relative to the victim’s speech at sentencing proceedings in order to remedy the imbalance created by the defendant. Such an argument possesses an initial appeal as it captures one’s innate desire to see “justice” rendered.

However, to the extent that defendants do speak on their own behalf at trial, their statements are likely to be carefully cabined and directed by defense counsel. Moreover, any number of institutional incentives temper against defendant speech. As a result, only a minority of those defendants who proceed to trial choose to testify. Likewise, an overwhelming majority of defendants enter guilty pleas rather than proceeding to trial at all. While entering a guilty plea makes it more likely the defendant will receive a shorter sentence, doing so also strips the defendant of his opportunity to be heard by the court. For many defendants then, sentencing represents one of the few opportunities to be directly acknowledged and heard by the court.

Additionally, the proposal to limit defendant speech at sentencing because he has already “spoken” through his acts overlooks two important factors. First, the defendant’s speech, whether through apology or mere explanation, may further correct rather than undermine the balance between the victim and defendant. Victims are often plagued with the question of why a crime was committed against them or their loved ones. When a defendant feels permitted to explain his actions, even if such an explanation does not express remorse or apology, some of the victim’s questions regarding the crime may be answered, potentially furthering the victim’s healing process. Moreover, a sentencing procedure that allows for broader expression from both victims and defendants provides a forum in which the moral and relational balance disrupted by the defendant’s criminal acts against the victim can be righted. Of course, there is

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

237. Natapoff, supra note 126, at 1450 & nn.2-3 (noting that only half of the defendants who proceed to trial testify).

238. *See id.* at 1450 (noting that over ninety-five percent of defendants never go to trial).

239. *See id.* at 1462.

240. *See Bibas & Bierschbach, supra* note 60, at 95-98; *Thomas, supra* note 57, at 2648.


242. *See supra* notes 91-95 and accompanying text.
no guarantee that a broader approach to defendant allocution will guarantee healing for the victim or for the defendant. However, a rite-based approach to defendant allocution is more likely than a mitigation approach to produce an environment conducive to such restorative speech.

Second, despite the importance of viewing crime as a relational disturbance between the defendant and victim, one must not forget that another aspect of the relational aspect of crime exists between the defendant, his broader community, and the state. By speaking on his own behalf at sentencing, the defendant may define, if not redefine, himself in terms of these other relationships. Through speech, we enter into a relationship with our subject matter, and define ourselves accordingly. When defendants are afforded broader opportunities to speak and be heard by the court, they are able to "attain and express their understanding or misunderstanding of legal dictates, their views on the fairness or unfairness of the procedures by which they are adjudicated, and, ultimately, their acceptance or rejection of the process and its outcome."\(^2\) Those defendants who refrain from speaking, either by choice or as a result of institutional disincentives, "are less likely to understand their own cases, engage the dictates of the law intellectually, accept the legitimacy of the outcomes, feel remorse, or change as a result of the experience."\(^3\) The rite of allocution, therefore, gives the defendant an opportunity to define himself, his relationship with the law, and his place in the world, in a manner separate and distinct from how he has been defined by the state and defense counsel.\(^4\) He can choose to express remorse and apology, to fervently assert his innocence, or to challenge the court or broader societal structures.

In advocating for increased defendant speech in all phases of the criminal justice process, Professor Alexandra Natapoff posits that when courts do not hear from defendants, the effectiveness of the criminal justice system is also undermined.\(^5\) Defendants are the subjects of a system designed specifically to respond to their intentional bad acts with specific laws and corresponding punishments. However, when we do not fully hear from offenders, we are unable to gauge how effectively the system conveys its expectations of acceptable social behavior to them, or how fairly its rules and procedures are administered. Professor Natapoff further contends that "[d]efendant silence . . . maintains the ignorance of institutional players such as judges and prosecutors who never hear the full story about the individuals before them, or indeed about the functioning of the justice system itself."\(^6\) Hence, the system's strength and legitimacy is

\(^{243}\) Natapoff, supra note 126, at 1451.

\(^{244}\) Id.

\(^{245}\) See Thomas, supra note 57, at 2673-74 & n.176.

\(^{246}\) See Natapoff, supra note 126, at 1488.

\(^{247}\) Id. at 1499; see also Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411 (1988) (discussing the important role that narrative plays in the law by not only building shared understandings about the world, but also by challenging one's perceptions regarding societal structures).
undermined. "[A] marketplace of ideas that does not include defendant voices is an impoverished one whose outcomes and conclusions are suspect."\(^{248}\)

The defendants' statements of defiance in *United States v. Mitchell*,\(^{249}\) *United States v. Kellogg*,\(^{250}\) and *United States v. Burgos-Andujar*\(^{251}\) find fuller meaning in this context. In each of those cases, the defendants' statements served to their detriment at sentencing. Nonetheless, there may be value in providing defendants a forum in which they are able to personally challenge the legal system, both to facilitate defendants' personal expression as well as to highlight legitimate system-wide injustices and further necessary legal change.\(^{252}\)

From a practical and advocacy standpoint, this may give some pause. There is no question that by speaking broadly and defiantly, the defendants in *Mitchell*, *Kellogg*, and *Burgos-Andujar* undermined any mitigating power sentencing allocution might provide. For a defendant, obtaining a shorter sentence by presenting oneself as silent or remorseful may far outweigh any therapeutic benefits or broader empowerment proffered by engaging in broader speech at sentencing.\(^{253}\)

However, some have questioned the value of limiting allocution solely to defendant expressions of remorse.\(^{254}\) First, many courts reject defendant's proffered apologies.\(^{255}\) Moreover, where courts are receptive to remorse and apol-

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249. 392 F.2d 214 (2d Cir. 1968) (draft dodger).
250. 955 F.2d 1244 (9th Cir. 1992) (tax protester).
251. 275 F.3d 23 (1st Cir. 2001) (military protester); see also *supra* notes 153-161 and accompanying text (discussing *Mitchell* and *Burgos-Andujar*).
252. See Natapoff, *supra* note 126, at 1487-88, 1498-1502. Professor Thomas furthers this argument by referencing Nelson Mandela's statements prior to being sentenced to life imprisonment. His comments did not include apology or remorse, but instead called for "an alternative vision of justice in the face of what he believed to be an unjust system." Thomas, *supra* note 57, at 2665-66. While admittedly an extreme example, Nelson Mandela's allocution speech nonetheless highlights that there may be settings where a defendant's non-mitigating speech may have incalculable value. *Id.* The system Mandela challenged and defied has now changed to resemble Mandela's "alternative vision of justice."
253. I must acknowledge Norman Lefstein for pressing me on this point.
ogy, the savvy and articulate defendant may gain an advantage over the less educated and demonstrative defendant. Allocator could also be manipulated into a moment of forced public shaming or false contrition by defendants thereby undermining the value of the process for the offender. Hence, a legitimate tension exists between viewing defendant allocution as a mitigating practice or as a means to therapeutically benefit the defendant. Certainly, employing allocution to obtain a shorter sentence—whether the defendant’s expressions of remorse are strategic or not—may outweigh the therapeutic, but less measurable benefits the defendant may obtain by speaking his truth to the sentencing court. Similarly, broader defendant speech does not necessarily guarantee institutional change, but could result in justifiably defiant defendants being subjected to even harsher sentences because of their allocution speech.

For the reasons laid out in this Article, I nevertheless champion a broader approach to defendant allocution. Just as there is little measurable or tangible benefit to the outcome of a sentencing hearing in granting a victim the right to “look the defendant in the eye and let him know the suffering his misconduct has caused,” the calculable benefits associated with allowing a defendant to use his allocution right to protest his innocence or challenge the criminal justice system are also limited. In fact, both could be viewed to undermine or distract from the sentencing process, and might more appropriately be expressed in a proceeding separate from sentencing. To narrow the scope of both victim and defendant allocution speech, however, would separate the parties from the power of the sentencing ritual and from the transformative benefits that inhere within its procedures.

The expansive scope of victim allocution appropriately recognizes the many layers which exist in the ritual of sentencing. In holding the defendant accountable for his actions, a victim’s broader speech, regardless of whether it tangibly affects the defendant’s sentence, provides an opportunity for transformation for both the victim and defendant. It also reminds all present that crime is multi-faceted. It implicates the victim and defendant, the defendant and his community, and the defendant and the criminal justice system. Granting the defendant an opportunity for a broader allocution, similar to that afforded to the victim, recognizes that the defendant may also desire to define or transform the relationship between himself and the system exerting power over him.

A final benefit associated with expanding the rite of defendant allocution is that a system which ensures that all relevant parties have been afforded an opportunity to be heard is perceived to be more equitable, legitimate, and just. Victims’ rights advocates have effectively capitalized on the fairness and equity argument in advancing the victim’s right to be heard at sentencing. How could

256. See Bibas & Bierschbach, supra note 60, at 105; Ward, supra note 255, at 135; Marshall, supra note 123, at 222-23.
257. See Bibas & Bierschbach, supra note 60, at 98, 102-03.
258. Kenna v. U.S. Dist. Court (Kenna I), 435 F.3d 1011, 1016-16 (9th Cir. 2006).
259. See supra note 221 and accompanying text.
a proceeding be fair when the party directly impacted by the crime is silenced? The same argument should apply with equal force to the defendant. The individual who will be directly impacted by the court's decision should be permitted to address the court, thereby furthering the perception that the institution rendering the sentence is fair and equitable. A public sentencing at which the defendant is given the right to speak allows the state "to assure the appearance of justice and to provide a ceremonial ritual at which society pronounces its judgment." The symbolic rite of allocution therefore not only benefits the defendant, but also the court, the state, and the public. Finally, one should not forget that a criminal trial is ultimately about the defendant. Certainly, the victim bears a deep and personal interest in the proceeding. It was the victim who

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

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


261. See, e.g., United States v. Adams, 252 F.3d 276, 288 (3d Cir. 2001) ("[A]locution is the type of important safeguard that helps assure the fairness, and hence legitimacy, of the sentencing process."); United States v. Myers, 150 F.3d 459, 463 (5th Cir. 1998) ("[T]he practice of allowing a defendant to speak before sentencing... has symbolic, in addition to functional, aspects."); United States v. Cole, 27 F.3d 996, 999 (4th Cir. 1994) ("When a defendant [is] unable to address the court before being sentenced and the possibility remains that an exercise of the right of allocution could have led to a sentence less than that received, we are of the firm opinion that fairness and integrity of the court proceedings would be brought into serious disrepute were we to allow the sentence to stand."); United States v. Barnes, 948 F.2d 325, 328 (7th Cir. 1991) ("Aside from its practical role in sentencing, the right has value in terms of 'maximizing the perceived equity of the process.'") (quoting 3 AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE 18-459 (2d ed. 1980)); see also United States v. Degenhardt, 405 F. Supp. 2d 1341, 1349 (D. Utah 2005) ("Part of the rite [of allocution] is a chance for the participants—the defendant, the prosecution, and now the victim—to have their say before sentence is imposed. That process is short circuited if one of the participants—the victim—is denied an opportunity to speak."); United States v. Marcello, 370 F. Supp. 2d 745, 746 n.2 (N.D. Ill. 2005) ("[T]he victim [is], in a moral sense, a party to the case and... should always be given the opportunity to testify at all sentencing hearings ...."); supra notes 96-97, 210, and accompanying text (regarding victims' satisfaction with the criminal process where they have been given the opportunity to participate in the sentencing proceeding).
was robbed, assaulted, or who lost a loved one at the hands of the defendant. However, it is the defendant who is subject to the power of the state and who may be deprived of his liberty, and perhaps even his life, at the end of the proceeding. When contemplating what may be just and fair, a sentencing proceeding that provides the defendant with a full opportunity for self-expression should be advanced.

CONCLUSION

Debates surrounding the victims' rights movement should no longer revolve around the question of whether victims must be granted an independent role in the criminal justice system. That day has already arrived. Instead, the more appropriate question concerns how we should define the victim's expanded role, and what implications that definition may have for how we should review the defendant's place within criminal proceedings. In addressing this question, one should always ask what balance, if any, should exist between the rights of victims and the rights of defendants.

In the quest to render more equitable and balanced treatment for victims and defendants in the criminal justice system, victims' rights advocates should not be content to accept the apparent imbalance that exists between victim allocution and defendant allocution in federal sentencing law. At present, victim allocution is driven largely by the ritualistic, cathartic, and participatory goals it serves, while defendant allocution is grounded in its mitigating functions. The result is that a victim's right to allocute is more likely to be enforced and to provide a wider opportunity for self-expression at sentencing than a defendant's right to allocute. Allocution, whether practiced by victims or defendants, should not exist merely because of its calculable ability to alter the defendant's sentence. Rather, allocution should instill within all individuals present and participating at the proceeding the understanding that the speaker's views on the matter before the court are valuable. Through the simple act of speaking and being heard, the speaker, and his or her experiences, are honored. When both victims and defendants can engage in a sentencing rite that dignifies the speaker, allows for catharsis, and enhances the legitimacy of the sentencing process, we may edge closer to a concept of fairness that is not strained to a filament, but that is indeed true.

262. See, e.g., Beloof, supra note 18, at 289; O'Hara, supra note 29, at 233-34, 241-42; Tolbolowsky, supra note 14, at 103.