

2009

The Right to Allocution: A Defendant's Word on Its Face or Under Oath?

Celine Chan

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Celine Chan, *The Right to Allocution: A Defendant's Word on Its Face or Under Oath?*, 75 Brook. L. Rev. (2009).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol75/iss2/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

The Right to Allocution

A DEFENDANT'S WORD ON ITS FACE OR UNDER OATH?

INTRODUCTION

Well son you got a statement you'd like to make
Before the bailiff comes to forever take you away
Now judge judge I had debts no honest man could pay
The bank was holdin' my mortgage and they was takin' my house away
Now I ain't sayin' that makes me an innocent man
But it was more 'n all this that put that gun in my hand . . .
And if you can take a man's life for the thoughts that's in his head
Then won't you sit back in that chair and think it over judge one more
time¹

In the lyrics above, a defendant appeared before a judge at the most critical time during his criminal proceeding. He had already been found guilty; he tried to explain his conduct; and he pled for the judge to spare him some liberty. In other words, he exercised his right to allocution.² Allocution is “[a]n unsworn statement from a convicted defendant to the sentencing judge or jury³ in which [she] can ask for mercy, explain [her] . . . conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.”⁴ In theory, a defendant’s primary objective is to present information to persuade a judge to impose a more favorable,

¹ BRUCE SPRINGSTEEN, *Johnny 99, on NEBRASKA* (Columbia Records 1982).

² This Note focuses on the defendant’s right to allocution in a criminal context. However, “allocution” has various other definitions unrelated to the criminal context. For example,

[i]n philology . . . allocution is an address, especially a formal, hortatory, authoritative address. “In Roman antiquity” it was a “formal address by a general-in-chief or emperor to his soldiers,” and, “[i]n the Roman Catholic Church” it is “a public address by the pope to his clergy or to the church generally.”

Paul W. Barrett, *Allocution*, 9 MO. L. REV. 115, 115 (1944).

³ Judges usually make sentencing decisions, but in some jurisdictions, and for some crimes, such as capital murder, a sentencing jury determines the punishment. LISA STOLZENBERG & STEWART J. D’ALESSIO, *CRIMINAL COURTS FOR THE 21st CENTURY* 351 (1999).

⁴ BLACK’S LAW DICTIONARY 88 (9th ed. 2009).

and thereby, more lenient, sentence.⁵ In practice, however, allocution raises many more complex questions. For example, in formulating an accurate and equitable sentence, should a judge simply believe the convicted defendant during allocution, or should the prosecutor or the judge test for truth? Likewise, should it matter how a defendant *acted* during allocution, or should the judge focus solely on the words *spoken*? And most importantly, will the judge *really* “sit back in that chair and think it over . . . one more time . . . [?]”⁶

Courts and the common law have recognized the right to allocution for over 300 years.⁷ Curiously, however, scholars have paid scant attention to this phase of sentencing,⁸ despite it being arguably one of the most important aspects of a criminal proceeding.⁹ In fact, for most defendants, vocal participation in

⁵ ARTHUR W. CAMPBELL, *LAW OF SENTENCING* 404 (3d ed. 2004); *see also* Jonathan Scofield Marshall, *Lights, Camera, Allocution: Contemporary Relevance or Director's Dream?*, 62 TUL. L. REV. 207, 211-12 (1987) (“For example, one defendant during his allocutory address stated: ‘I did wrong, your honor, and I have come back to face up to it. I am begging the court for mercy. I am ready to accept my punishment.’”) (citation omitted).

⁶ *See* SPRINGSTEEN, *supra* note 1.

⁷ *See* Green v. United States, 365 U.S. 301, 304 (1961); *see also* Marshall, *supra* note 5, at 209 (“The right of a prisoner to speak in his own behalf before sentencing, sometimes called the *allocutus*, was recognized by the common law as early as 1682.”).

⁸ Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2644 (2007) (explaining that “few scholars have systematically studied the practice or examined the theoretical underpinnings of the right”). However, with sentencing law “under increased scrutiny, we need to refocus attention on the purposes underlying our sentencing practices.” *Id.* Thomas suggests that courts paid little attention to allocution because under old sentencing practices, judges were confined to “formulaic outcomes unrelated to the life circumstances of individual defendants.” *Id.* at 2654-55; *see also* AMERICAN BAR ASSOCIATION, JUSTICE KENNEDY COMMISSION: REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 1 (2004) (while speaking on corrections and punishment, Justice Kennedy said, “The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems lose all interest.”); Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victim's Right Act*, 26 YALE L. & POL'Y REV. 431, 458 (2008) (recognizing that “the defendant's right to allocute . . . has not been subject to extensive judicial or scholarly attention”); Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1771-72 (2003) (recognizing that trial rights at sentencing are not clear, confusing, and not well understood); Felix Valenzuela, *Dialogic Allocution* 1 (The Berkley Electronic Press, Working Paper No. 1952 2007), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=9190&context=expresso> (noting that “one aspect of sentencing has been continually neglected: allocution”).

⁹ Thomas, *supra* note 8, at 2644 (“Courts . . . give short shrift to any inquiry into allocution's function, even in cases in which distilling the underlying purpose of the practice would guide the court's decision.”); *see also* Harvard Law Review

their defense does not begin until after they are granted their right to allocution during sentencing.¹⁰ More significantly, the length and the severity of a defendant's sentence are determined in large part through the defendant's allocution statement.¹¹ Thus, because a defendant's "liberty and livelihood are on the line"¹² during allocution, the process is absolutely a vital part of a criminal proceeding. Accordingly, the purpose and scope of allocution should command much more critical attention.

Generally, a statement during allocution is neither sworn under oath nor subject to cross-examination.¹³ This Note argues that allocution, in its present free-form, fails to achieve

Association, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 821 (1968).

Once it has been determined by trial or by a guilty plea that a criminal defendant shall be subjected to the sanctions of the criminal law, there remain difficult and complex questions of sentencing: whether the sanction should be imprisonment or suspended sentence and probation; and if either of these, under what conditions and for how long. If the sanction is imprisonment, there may be choice among several types of institution. In capital cases, a decision must be made as to whether the convicted man should be deprived of life.

Id.

¹⁰ See, e.g., CASSIA C. SPOHN, HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 119 (2002) ("most convictions result from guilty pleas, not trials."); Thomas, *supra* note 8, at 2642 (noting that since few defendants tell their story during a trial, most do not speak until the sentencing hearing); Harvard Law Review Association, *supra* note 9, at 821 ("[T]he vast majority of defendants plead guilty; for them the only significant formal procedures of criminal administration are those culminating in the sentence . . ."). Indeed, in 1998, "94 percent of federal defendants pled guilty," and consequently did not have a jury or bench trial. See SPOHN, *supra*, at 62.

¹¹ Valenzuela, *supra* note 8, at 6.

¹² *Id.*

¹³ See, e.g., *Thanos v. State*, 622 A.2d 727, 732 (Md. 1993); *Harris v. State*, 509 A.2d 120, 123 (Md. 1986); see also Thomas, *supra* note 8, at 2667. But see *Echavarría v. State*, 839 P.2d 589, 596 (Nev. 1992) ("The right of allocution is not intended to provide a convicted defendant with an opportunity to introduce unsworn, self-serving statements of his innocence as an alternative to taking the witness stand. The proper place for the introduction of evidence tending to establish innocence is in the guilt phase of trial."). Nevada limits the right to allocution to pleas for mercy and allocution is not for the advancement or disputing of facts—a process more properly confined to evidence at trial and as such, the State does not recognize the unsworn nature of the right. See *Echavarría*, 839 P.2d at 596.

This Note argues that, for the right to allocution in jurisdictions where a defendant may "speak or present any information [in] mitigat[ion of punishment,] testimony should be subject to the evidentiary safeguards of oaths and cross-examinations because facts will be advanced. FED. R. CRIM. P. 32 (i)(4)(A)(ii); see also VT. R. CRIM. P. 32(a)(1)(C) ("Before imposing sentence the court shall: address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information relevant to sentencing.") (emphasis added). But see *infra* notes 235-239 and accompanying text.

its fundamental purposes, and, therefore, is irreconcilable with our adversarial system. Allocution primarily aims to promote sentencing accuracy and to enhance the perceived equity of sentencing proceedings.¹⁴ But these goals cannot be realized without the stringent evidentiary mechanisms of our adversarial system—i.e., oaths and cross-examination.¹⁵ This Note further argues that with significant evidentiary reform, allocution's effectiveness will be enhanced¹⁶ and its two fundamental goals will be achieved.¹⁷ In particular, these safeguards will further allocution's purpose of enhancing both sentencing accuracy and sentencing equity. Over time, the efficiency of sentencing proceedings as a whole will also be improved.

Part I of this Note critically examines allocution's past and present justifications. This Part argues that significant inadequacies currently plague allocution, rendering both its historical and its modern justifications untenable and unduly frustrated.¹⁸ Nevertheless, Part II rejects an outright dismissal of the right to allocution by acknowledging allocution's prominence in the criminal justice system as well as by analyzing a significant change in California's allocution law in light of *People v. Evans*.¹⁹ Finally, Part III argues that in light of allocution's importance in criminal proceedings, California's

¹⁴ See *infra* Part I.B.1-2.

¹⁵ See *infra* Part I.B.1.a & 2.a.

¹⁶ See *infra* Part III.A-B.

¹⁷ The right to allocution in non-capital and capital cases is different. In some capital cases, "courts have refused to allow the defendant to make an unsworn statement to the jury or to make a statement to the jury without being cross-examined." Thomas, *supra* note 8, at 2652. But see *Echavarría*, 839 P.2d at 596 ("Capital defendants in . . . Nevada enjoy the common law right of allocution, which is recognized as 'the right of the defendant to stand before the sentencing authority and present an unsworn statement in mitigation of sentence, including statements of remorse, apology, chagrin, or plans and hopes for the future.'" (quoting *Howick v. State*, 825 P.2d 600, 604 (Nev. 1992))). This Note does not focus on the right to allocution in capital cases for which evidentiary safeguards are justified "[d]ue to the severity of the punishment . . ." Thomas, *supra* note 8, at 2652; see also *People v. Nicolaus*, 817 P.2d 893, 910 (Cal. 1991) (denying the defendant in a capital case the right to an unsworn allocution because "defendant would thereby have been 'testifying' as to 'new factual information without the benefit of an oath and without cross-examination,' a patently improper procedure"). Rather, this Note focuses on procedural safeguards for non-capital cases, which traditionally do not require oaths or cross-examination. See *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 858 (Pa. 1989).

¹⁸ See, e.g., *Marshall*, *supra* note 5, at 208, 211 (referring to allocution as an "ancient formality" whose current present use is "repeatedly questioned" and "appears merely superfluous").

¹⁹ *People v. Evans*, 187 P.3d 1010 (Cal. 2008).

novel and more innovative approach²⁰ should be adopted nationally to facilitate a uniform system of evidentiary safeguards as an essential component of allocution.

I. THE RIGHT TO ALLOCUTION: THE HISTORY AND THE CURRENT PROBLEM

Allocution occurs after a defendant is found guilty, but before the judge imposes an official sentence.²¹ During allocution, a defendant may contest factors related to sentencing.²² Today, a defendant may speak to the evidence at trial, explain her role in an offense, or downplay the severity of her crime in an attempt to secure a more favorable sentence.²³ However, allocution has not always been so broad. This Part provides a brief history of the right to allocution and examines its historical justifications, contending that they are no longer applicable. This Part also analyzes allocution's modern theoretical goals, arguing that they are irreconcilable with current practice.²⁴ Accordingly, allocution cannot continue to exist in its present form. However, because of allocution's

²⁰ Indeed, experts have often noted that California has a relatively progressive sentencing system. See GERHARD O.W. MUELLER, SENTENCING: PROCESS AND PURPOSE 20 (1977).

²¹ The Supreme Court of Indiana recently described the right to allocution:

The trial is over, the jury has reached a verdict and the accused is guilty of the crime with which he was charged. Now he stands at the bar of justice, a prisoner, and the judgment of the law is to be pronounced. But, before the court decrees the inexorable legal consequences which necessarily follow the finding of guilt, the court formally addresses the prisoner, informs him of the jury's verdict and directly puts the interrogatory, "Do you know of any reason why judgment should not be pronounced upon you?"

Biddinger v. State, 868 N.E.2d 407, 410 (Ind. 2007) (citations omitted).

²² CAMPBELL, *supra* note 5, at 404 ("[A]llocution provides offenders the opportunity to contest any disputed factual bases for sentencing and persuade the judge to choose a favored sentence alternative.").

²³ *United States v. Carter*, 355 F.3d 920, 926 (6th Cir. 2004).

²⁴ Without oaths and cross-examinations, allocution can harm defendants and undermine the efficiency and accuracy of already "chaotic" sentencing proceedings. See Senator Edward M. Kennedy, *Forward* to MICHAEL J. CHURGIN ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM vii, viii (1977). While the book's proposal to reform procedural aspects of sentencing refers specifically to the federal system, the authors suggest that the same criticisms and reform proposals apply equally to states. See MICHAEL J. CHURGIN ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM, *supra*, at 82; see also SPOHN, *supra* note 10, at ix (acknowledging that while many people think that judges fashion sentences reflecting facts and circumstances, background, and blameworthiness of the defendant, "[t]he reality . . . is somewhat different").

lingering prominence in our justice system,²⁵ it should not be dismissed, but rather redefined with evidentiary reform.

A. *Historical Justifications for the Right to Allocution*

The right to allocution, also known as *allocutus*, originated in England when criminal proceedings were very different from those of today.²⁶ Historically, the common law right to allocution²⁷ was very formalistic and limited in scope. After a defendant was pronounced guilty, but before the court imposed an official sentence, the judge would ask, “Do you know of any reason why judgment should not be pronounced upon you?”²⁸ This question allowed a defendant to “move in arrest of judgment,”²⁹ and respond with a limited number of reasons.³⁰ These reasons were strictly defined to include pardon, pregnancy, insanity, misidentification, or benefit of the clergy.³¹ Although these legal grounds, if accepted, relieved a defendant of his impending sentence,³² the judges rarely

²⁵ See *infra* Part II.A.

²⁶ John H. Dawson Jr., *Federal Rules of Criminal Procedure—Courts Should Afford Defendant a Personal Opportunity to Speak Before Sentence is Pronounced*, 6 AM. U. L. REV. 117, 117 (1957).

²⁷ The common law doctrine of allocution is based entirely on four early cases: *Rex v. Royce*, 98 Eng. Rep. 81 (K.B. 1767), *The King v. Speke*, 91 Eng. Rep. 872 (K.B. 1689-1712), *Rex & Regina v. Geary*, 91 Eng. Rep. 532 (K.B. 1689-1712), and *Anonymous*, 87 Eng. Rep. 175 (K.B. 1669-1732). See *Marshall*, *supra* note 5, at 209 n.16; *accord Barrett*, *supra* note 2, at 121.

²⁸ *Thomas*, *supra* note 8, at 2645. Variations of allocution have been articulated by prominent writers in numerous treatises. See *Barrett*, *supra* note 2, at 116. According to Blackstone, allocution occurred when “upon capital charge . . . [the prisoner] is either immediately, or at a convenient time soon after, asked by the court, if he has anything to offer why judgment should not be awarded against him. . . .” *Id.* at 117 (citation omitted). Chitty articulated allocution as the defendant’s right “to say why judgment of death should not be pronounced on him” as “indispensably necessary[.]” *Id.* at 117-18 (citation omitted). Archbold described allocution to involve the clerk asking the prisoner “have you anything to say why sentence of death should not be passed (or recorded) against you[.]” *Id.* at 118-19 (citation omitted).

²⁹ *Marshall*, *supra* note 5, at 210. “Arrest of judgment” is “[t]he staying of a judgment after its entry; [for example,] a court’s refusal to render or enforce a judgment because of a defect apparent from the record.” BLACK’S LAW DICTIONARY, *supra* note 4, at 125.

³⁰ *Thomas*, *supra* note 8, at 2646; see also *Marshall*, *supra* note 5, at 210.

³¹ *Thomas*, *supra* note 8, at 2646. As for a pardon, a defendant could claim or purchase the benefit. *Marshall*, *supra* note 5, at 210. If pregnant, a woman could postpone her execution until after birth. *Id.* If defendant responded that she was insane, she would still be guilty, but would be exempt from punishment. *Id.* Finally, as to “benefit of the clergy,” it was “an immunity claimed by the church and conferred by the monarch from scriptural authority.” *Barrett*, *supra* note 2, at 120 n.23 (citation omitted).

³² See *Marshall*, *supra* note 5, at 209 n.16.

explained *why* this was the case.³³ Thus, scholars have attempted to glean rationales for these historical excuses. According to Professor Arthur W. Campbell, the permitted allocutions ensured that the court sentenced the same person who was convicted, while also giving the defendant an opportunity to persuade the court to suspend his sentence.³⁴ According to Clinical Assistant Professor Kimberly A. Thomas, allocution also offered courts an opportunity to correct errors, and substituted for modern criminal justifications, like insanity and self-defense.³⁵

When allocution first originated, it also gave a defendant his only opportunity to speak at his criminal proceeding.³⁶ Since a defendant did not have the right to counsel,³⁷ allocution afforded the defendant a *single* opportunity to present legal arguments in his favor.³⁸ Furthermore, during this period, punishment for most crimes was death.³⁹ Accordingly, it was imperative that a defendant have an opportunity to avoid the extraordinarily harsh consequences of the antiquated use of capital punishment.⁴⁰ In particular, after the defendant was pronounced guilty, the law treated him as legally dead—he could no longer perform legal functions⁴¹ and as a result, his family became ancillary victims.⁴² In response, the common law developed the right to allocution as a “palliative.”⁴³ However, a more accurate description of

³³ Thomas, *supra* note 8, at 2646 (“Early English and American scholars described the practice, but gave little insight into why allocution was thought to be important.”).

³⁴ CAMPBELL, *supra* note 5, at 404.

³⁵ Thomas, *supra* note 8, at 2647 (explaining that if these were the historical reasons for the permissible excuses, allocution probably has little meaning today in light of the statutory and common law defenses in existence).

³⁶ *Id.* (“[D]efendants did not have the right to testify on their own behalf at trial . . .”).

³⁷ *Id.*

³⁸ *See id.* at 2647-48 (explaining that defendants did not necessarily have counsel to present legal arguments in their favor and that “defendant’s one opportunity to speak to the court came at the sentencing phase”).

³⁹ *See* Barrett, *supra* note 2, at 119 (“The common law punishment for all felonies except petty larceny and mayhem was death.”). “Though there were said to be degrees of judgments in treason, they invariably resulted in the same punishment—death—if and when the sentence was carried out.” *Id.*

⁴⁰ *See id.* at 119-20.

⁴¹ *See id.* at 120. Of particular concern, the defendant could not make a will or arrange for the disposal of his property, which he, by default, forfeited to the Crown.

⁴² *See id.* at 119-20 (explaining that a defendant’s “ancestors, his immediate family, and his posterity” also became victims).

⁴³ *Id.* at 120.

allocution would have little to do with leniency.⁴⁴ Specifically, since judges historically had no discretion in ordering punishment, allocution was really a defendant's only chance to "arrest proceedings" in their entirety.⁴⁵

Regardless of the description ascribed to early allocution, modern criminal proceedings are markedly different from those when the right first originated. Today, a defendant is permitted to raise a wide variety of excuses to mitigate punishment, as opposed to the strictly defined reasons under traditional allocution.⁴⁶ In addition, today's defendant has a guaranteed right to counsel,⁴⁷ an opportunity to testify on her own behalf,⁴⁸ and is less frequently subject to the death penalty.⁴⁹ Consequently, a defendant's panoply of modern rights during criminal proceedings renders the historical justifications for allocution essentially moot. Indeed, both courts and scholars have argued that allocution is currently a "mere formality" that can be omitted without depriving a defendant of any important right.⁵⁰

⁴⁴ See Thomas, *supra* note 8, at 2654-55 (noting that sentencing schemes hundreds of years ago were very "formulaic" and had little to do with the other facts and circumstances of a defendant's life).

⁴⁵ See *Vicory v. State*, 802 N.E.2d 426, 429-30 (Ind. 2004) ("At common law . . . allocution was not given to 'seek mitigating evidence or a plea for leniency, but rather to give the defendant a formal opportunity to show one of the strictly defined legal grounds for avoidance or delay of the sentence.'"); see also Marshall, *supra* note 5, at 211.

⁴⁶ Giannini, *supra* note 8, at 460.

⁴⁷ U.S. CONST. amend. VI. Counsel may raise arguments on behalf of her client to mitigate punishment. See Giannini, *supra* note 8, at 461 ("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 the pre-sentence reports, and by filing post-judgment appeals."); 22 C.J.S. *Criminal Law* § 339 (2008) ("[T]he accused in any criminal case has, and, in the absence of waiver, cannot be denied, the right to have the assistance of, and to be heard by, counsel in his or her defense.").

⁴⁸ U.S. CONST. amend VI; 22 C.J.S. *Criminal Law* § 898 ("The accused in a criminal case has a constitutional right to take the witness stand and testify in his or her own defense.").

⁴⁹ Giannini, *supra* note 8, at 460; accord *Harris v. State*, 509 A.2d 120, 125 (Md. 1986) ("[B]ecause the defendant's rights to obtain counsel and to testify at trial adequately protected most of the interest previously safeguarded only by allocution, the importance of allocution declined."). For a state survey of present crimes that result in the death penalty, see U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2007—STATISTICAL TABLES, <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st01.htm> (last visited July 29, 2009).

⁵⁰ See generally 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 § 4[b] (1964) ("The view has usually been taken that the propounding of such an inquiry is a mere form which can be omitted under modern court practice without depriving a prisoner of any substantial

B. Current Justifications for the Right to Allocution

In response to developments in criminal proceedings, both the scope and purpose of the right to allocution have changed in some ways, such that it can potentially continue to assume a useful and vital role in the criminal justice system.⁵¹ Specifically, with the rise of additional sentencing alternatives, allocution can now play an increasingly meaningful role in determining an *accurate* and a *fair* sentence, rather than *whether* to sentence at all.⁵² This Part discusses how the justifications for allocution have evolved to encompass the promotion of sentencing accuracy by mitigating and individualizing sentences, as well as the enhancement of the perceived equity of sentencing by humanizing and legitimizing the process.⁵³ Further, this Part argues that although these justifications are well-accepted,⁵⁴ both goals are frustrated by allocution's lack of evidentiary safeguards. Consequently, testimony during allocution should be sworn and subject to cross-examination like traditional trial witness testimony.⁵⁵

1. Promoting Accuracy: The Mitigation and Individualization Justification

Promoting sentencing accuracy is one of allocution's fundamental goals. In particular, the allocution process aims to

right.”). Courts have also reiterated a similar view in light of modern-day criminal procedure. *See, e.g.*, *Boehm v. State*, 209 N.W. 730, 731 (Wis. 1926); *State v. Hoyt*, 1880 WL 2281, at *18 (Conn. 1880) (“If we compare the rules and practice that obtained in England with our own it will readily be suggested that the reasons that made the inquiry of the prisoner so essential do not apply at all in this state Under our practice what possible harm can be occasioned to the prisoner by such an omission on the part of the court?”); *Dutton v. State*, 91 A. 417, 421 (Md. Ct. App. 1914) (trend is to regard allocution as a mere formality, the omission of which is not reversible error). *But see United States v. Myers*, 150 F.3d 459, 463 (5th Cir. 1998) (noting that the rule is not a mere formality; “it has value in terms of maximizing the perceived equity of the [sentencing] process”).

⁵¹ *See infra* notes 184-188 and accompanying text.

⁵² *Dawson Jr.*, *supra* note 26, at 117 (noting that during allocution's genesis, most felonies were subject to capital punishment or extreme torture).

⁵³ *Thomas*, *supra* note 8, at 2644 (laying out the current justifications of mitigation and humanization, and then arguing that humanization is currently the more sensible justification in light of the current practice of the right to allocution).

⁵⁴ *See People v. Wellington*, No. 281529, 2008 WL 4927230, at *1 (Mich. Ct. App. Nov. 18, 2008) (“The purpose of the right to allocution is to allow a defendant ‘to speak in mitigation of the sentence,’ to equalize the sentencing process, and to allow the defendant to begin an atonement or healing process.”) (citing *People v. Petty*, 665 N.W.2d 443, 450 (Mich. 2003)); *see also infra* Parts I.B.1-I.B.2.

⁵⁵ *See infra* notes 209-210 and accompanying text.

pull information from a defendant so that a judge may accurately mitigate and individualize punishment.⁵⁶ Without allocution, much of the information necessary to achieve the goals of mitigation and individualization—and ultimately, sentencing accuracy—would never be realized. Indeed, a defendant's allocution is arguably the most important factor in securing an accurately mitigated and individualized sentence.⁵⁷

Allocution promotes sentencing accuracy by facilitating sentences well-adapted to what a defendant deserves in her circumstances.⁵⁸ During allocution, a defendant may present information to convince a judge to reduce the length or harshness of the sentence based on the defendant's individual situation.⁵⁹ Allocution is important because even though some—but not nearly all—evidence of a defendant's crime is adduced at trial, judges must consider additional evidence during sentencing in order to fashion an accurate punishment.⁶⁰ Specifically, the bifurcated process of a criminal proceeding⁶¹ carefully excludes evidence of the defendant's character and background evidence during the trial.⁶² As a result, the judge

⁵⁶ See Thomas, *supra* note 8, at 2657 (“Allowing the defendant to [allocute] lets [a judge] determine a fitting punishment. A mitigation purpose complements the policy goal of accurate sentencing by permitting the offender to convey information to the judge that is necessary to a correct sentencing . . .”).

⁵⁷ J. Thomas Sullivan, *The Capital Defendant's Right to Make a Plea for Mercy: Common Law Allocution and Constitutional Mitigation*, 15 N.M. L. REV. 41, 41 (1985) (“The defendant's appearance and testimony before the sentencing jury or judge often plays the most significant role in securing a favorable sentencing verdict.”).

⁵⁸ Federal courts' treatment of allocution also suggests this mitigation rationale. See Thomas, *supra* note 8, at 2656-57. Specifically, federal courts subject a violation of the right to allocution to harmless error analysis, and therefore “consider what the defendant would have said and whether his sentence was high or low compared with the guidelines for that court.” *Id.* Necessarily then, these courts implicitly assume “the crux of the allocution is the defendant's ability to give information that will influence the sentence.” *Id.* at 2657.

⁵⁹ *Id.* (“A mitigation purpose complements the policy goal of accurate sentencing by permitting the offender to convey information to the judge that is necessary to a correct sentencing under the jurisdiction's sentencing system.”).

⁶⁰ MUELLER, *supra* note 20, at 25-26 (explaining that the bifurcated criminal trial excludes evidentiary item on a defendant's character and background during trial); see also SPOHN, *supra* note 10, at 118-19 (recognizing that because most convictions result from guilty pleas, judges “may know little more about the case than the facts necessary to support a guilty plea . . . [and while a] presentence investigation might fill in some of the details about the crime and offender . . . the offender might waive the investigation or the probation department might conduct a cursory review”).

⁶¹ A criminal proceeding occurs in two phases: the determination of guilt or innocence, followed by the determination of an appropriate sentence. MUELLER, *supra* note 20, at 3. My focus will be on the determination of an appropriate sentence phase.

⁶² *Id.* at 25-26 (explaining that the American model of the bifurcated criminal trial excludes evidentiary items on the defendant's character and background during the trial); see also FED. R. EVID. 404.

cannot consider this information until sentencing.⁶³ Indeed, the defendant is defined merely by the crime at trial, and is not judged as a human until pronounced guilty.⁶⁴ Therefore, allocution provides a defendant with one of her only chances to present evidence about *herself*, rather than about her crime.⁶⁵

During allocution, a defendant may give “reasons why the [sentencing] court should view [her] as less responsible for [her] acts or view the offense as less severe.”⁶⁶ For example, a defendant may explain why a customary sentence would be

⁶³ MUELLER, *supra* note 20, at 3.

⁶⁴ *Id.* at 6 (noting that a defendant is not “judged as a human being, before it is determined that he or she committed the act in question”).

⁶⁵ CAMPBELL, *supra* note 5, at 404; *see also* Dawson Jr. *supra* note 26, at 119 (“[S]o long as there is the possibility that the defendant may apprise the court of any mitigating circumstances which might diminish his sentence it seems the opportunity for him [to allocute] remains invaluable.”); Sullivan, *supra* note 57, at 57 (“[A]llocution has evolved as a legal concept relating to the accused’s right to make a personal plea for mitigation of punishment.”).

⁶⁶ Thomas, *supra* note 8, at 2655. The ABA has identified some mitigating circumstances to include, specifically that:

- i) An offender acted under strong provocation, or other circumstances in the relationship between the offender and the victim were extenuating.
- ii) An offender played a minor or passive role in the offense or participated under circumstances of coercion or duress.
- iii) An offender, because of youth or physical mental impairment, lacked substantial capacity for judgment when the offense was committed.
- iv) Another ground exists that, although not amounting to a defense, excuse or justification, diminishes the gravity of an offense or an offender’s culpability.

Similarly, the ABA has identified some aggravating circumstances to include, specifically that:

- i) An offense involved multiple participants and the offender was the leader of the group.
- ii) A victim was particularly vulnerable.
- iii) A victim was treated with particular cruelty for which an offender should be held responsible.
- iv) The offense involved injury or threatened violence to others committed to gratify an offender’s desire for pleasure or excitement.
- v) The degree of bodily harm caused, attempted, threatened or foreseen by an offender was substantially greater than average for the given offense.
- vi) The degree of economic harm caused, attempted, threatened or foreseen by an offender was substantially greater than average for the given offense.
- vii) The amount of contraband materials possessed by the offender or under the offender’s control was substantially greater than average for the given offense.

unduly harsh in light of her physical or mental condition⁶⁷—i.e., evidence of the defendant’s background, upon which the trial did not shed sufficient light. Toward this end, the defendant aims to inform the court of aspects about herself that the judge may consider in fashioning a more accurately mitigated punishment.⁶⁸

Furthermore, because the current sentencing landscape grants judges greater discretion in determining both the length and the nature of punishment, allocution also promotes sentencing accuracy by enabling judges to fashion individualized punishments⁶⁹ to “fit [each] offender.”⁷⁰ Allocution has the potential to personalize sentences in this way because through allocution, a judge embarks upon the process of obtaining the most complete and, ideally, the most accurate information about a defendant’s life and character.⁷¹

⁶⁷ Thomas, *supra* note 8, at 2655. In addition, during sentencing, judges will consider a defendant’s background, any guilty plea, and information in presentence reports. CAMPBELL, *supra* note 5, at 364-65. Moreover, as judges “struggle to impose just punishments, [they] consider the harm done by the crime, the blameworthiness and culpability of the offender, and the offender’s potential for rehabilitation.” SPOHN, *supra* note 10, at 118.

⁶⁸ There is little doubt that factors beyond a defendant’s personal circumstances are also considered. For example, “a judge’s decision may be influenced by his or her personal characteristics, by organizational factors such as prison overcrowding, or by community considerations.” D’ALESSIO & STOLZENBERG, *supra* note 3, at 352.

⁶⁹ CAMPBELL, *supra* note 5, at 355 (“The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court.”); *see also* Williams v. New York, 337 U.S. 241, 246 (1949) (explaining that courts have a “policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed”); SPOHN, *supra* note 10, at 69 (noting that sentencing guidelines and minimum sentences somewhat restrict judicial discretion, but, ultimately, they do not dictate a judge’s decision as to who goes to prisons and for how long); Harvard Law Review Association, *supra* note 9, at 822 (“Broad official judicial sentencing discretion became common in the nineteenth century as statutes prescribing ranges of penalty replaced the old system of fixed penalties.”); Caren Myers, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 COLUM. L. REV. 787, 793 (1997) (“The new principle of individualization—a natural outgrowth of the modern preoccupations with psychology, scientific deterrence, and rehabilitation, which all, in their ways depend on an understanding of the individual—emerged in its full form during the first half of the twentieth century.”); Thomas, *supra* note 8, at 2655 (noting that in light of changes in the sentencing landscape, allocution deserves more attention today).

⁷⁰ SPOHN, *supra* note 10, at 118.

⁷¹ Williams, 337 U.S. at 246 (“Highly relevant—if not essential—to [a judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.” (internal citation omitted)); *see also* Harvard Law Review Association, *supra* note 9, at 823 (recognizing the “ambitious goal” of “tailor[ing] the sentence to the personality and circumstances as well as the crime of each prisoner, as determined after an investigation into every significant

Toward this end, a judge weighs discretionary factors, including, among other factors, prior crimes, the severity of the harm caused, “the degree of inducement, facilitation or provocation,” and “whether the defendant has or can compensate the victim.”⁷² The demographic and socioeconomic status of the defendant⁷³ may further affect the judge’s decision.⁷⁴ Judges will even glean reasons as to the offender’s motivations and the degree to which she has cooperated with law enforcement.⁷⁵ These discretionary factors ultimately help to facilitate a sentence that incorporates the individual circumstances of the defendant such that punishment is not based strictly on the crime.⁷⁶

Very importantly, this type of personalized information is revealed most thoroughly by a defendant during allocution.⁷⁷ Thus, without allocution or other pre-sentencing information,⁷⁸ a judge would be unprepared to impose an appropriately

aspect of his past and present life”); Myers, *supra* note 69, at 793 (“Individualization required increased information: to determine the just sentence, judges had to receive information beyond what was sufficient for convicting the offender.”).

⁷² CAMPBELL, *supra* note 5, at 357-58; *see also* SPOHN, *supra* note 10, at 118 (“In attempting to understand offenders, assess their blameworthiness, and predict their future dangerousness, judges examine the past criminal behavior of offenders, as well as their life histories and current circumstances.”).

⁷³ As to demographics, a sentence may depend on gender, age, and race/ethnicity of an offender; as to socioeconomic status, factors include education and income; and as to social stability, a judge considers employment, marital history, responsibility for minor children, and history of substance abuse. SPOHN, *supra* note 10, at 88.

⁷⁴ *See id.* at 118 (“[Judges] consider the offenders’ educational histories, family and work situations, community ties, and conduct since the arrest.”); *see also* DeAngelo v. Schiedler, 757 P.2d 1355, 1358 (Or. 1988) (“Oregon’s current ‘modified just deserts’ approach . . . requires the sentencing judge to be fully informed of the defendant’s criminal history, the crime severity, and aggravating and mitigating matters . . .”).

⁷⁵ SPOHN, *supra* note 10, at 118.

⁷⁶ Harvard Law Review Association, *supra* note 9, at 823; *see also* SPOHN, *supra* note 10, at 118 (“Assessing offenders in this way allows judges to make substantial and refined distinctions between offenders who might appear quite similar if one looked only at the legal wrong committed and the harm it caused.” (internal quotation marks omitted)).

⁷⁷ *See, e.g.*, Harris v. State, 509 A.2d 120, 123 (Md. 1986) (noting that allocution “is not limited to the record in the case, inferences from material in the record, and matters of common human experience”).

⁷⁸ *See* SPOHN, *supra* note 10, at 119 (explaining that because most convictions result from guilty pleas, judges “may know little more about the case than the facts necessary to support a guilty plea . . . [and while a] presentence investigation might fill in some of the details . . . the offender might waive the investigation or the probation department might conduct a cursory review”).

individualized sentence.⁷⁹ However, after considering the variables revealed during allocution, judges have the tools and the information “to fashion sentences that fit individual offenders.”⁸⁰ Likewise, with developments in social sciences and penology, sentencing has also become a method of addressing societal interests through individual reformation.⁸¹ Without individual information on the defendant’s background, courts would be ill-equipped to fashion custom alternative punishments, like probation,⁸² to address societal interests.⁸³ Therefore, “modern concepts of individualizing punishment” certainly require a defendant to be afforded an opportunity to present a personal statement before sentencing in order to reveal vital and relevant information.⁸⁴ In sum, through allocution, judges have the potential to mitigate and individualize sentences, ultimately promoting more accurate and appropriate punishments.

a. Promoting Accuracy Justification Is Untenable

Notwithstanding allocution’s *potential* to promote sentencing accuracy by mitigating and individualizing sentences, this justification, like allocution’s historical

⁷⁹ Judges would not be fully informed if sentencing information was restricted to that given by witnesses during trial. *See Boardman v. Estelle*, 957 F.2d 1523, 1531 (9th Cir. 1992) (Holcomb Hall, J., dissenting) (citing *Williams v. New York*, 337 U.S. 241, 250 (1949)).

⁸⁰ SPOHN, *supra* note 10, at 118. Considering this information likely to be brought out during an allocution statement “allows judges to make substantial and refined distinctions between offenders who might appear quite similar if one looked only at the legal wrong committed and the harm it caused.” *Id.* (internal citation omitted).

⁸¹ Harvard Law Review Association, *supra* note 9, at 823.

⁸² Other alternative punishments include “boot camps, house arrest and electronic monitoring, day reporting centers, community service, restitution and fines.” SPOHN, *supra* note 10, at 46.

⁸³ “The primary alternative to incarceration is probation.” *Id.* at 41. Judges have “wide discretion in deciding between prison and probation for offenses that are not subject to mandatory minimums.” *Id.* Moreover, a judge may impose probation unless he believes that “(a) the offender is likely to commit additional crimes if released, (b) the offender is in need of treatment that can be provided more effectively in jail or prison, or (c) probation would be inappropriate given the seriousness of the offender’s crime.” *Id.* Significantly, even state probation statutes recognize that a judge must be well-versed with the “offender’s motivation or intent, the role played by the offender in the crime, provocation, . . . the offender’s criminal history, and the burden that imprisonment would place on the offender’s dependents.” *Id.* at 41-42.

⁸⁴ *Williams*, 337 U.S. at 247. While I agree that individualization requires “pertinent information,” unlike the Supreme Court, I propose that this requirement is what mandates evidentiary safeguards. *See id.* (the need for “pertinent information” means a judge should not have to adhere to “restrictive rules of evidence”).

justifications, is also currently moot. As noted, allocution allows a defendant to speak without being sworn under oath or subjected to cross-examination.⁸⁵ More significantly, because of allocution's current liberal form, both scholars and courts have simply accepted without question that a statement made during allocution is not "verifiably true or false."⁸⁶ The legitimacy of this acceptance is particularly dubious in light of our adversarial system. More troubling, however, is that allocution cannot promote sentencing accuracy when testimony is not necessarily credible.⁸⁷

Since allocution aims to mitigate a sentence by piecing together a defendant's complete story, courts have recognized that defendants will necessarily assert and dispute personal facts and circumstances,⁸⁸ which our adversarial system would

⁸⁵ *Thanos v. State*, 622 A.2d 727, 732 (Md. 1993) (quoting *Harris v. State*, 509 A.2d 120, 127 (Md. 1986)) (stating that allocution "provides a unique opportunity for the defendant himself to face the sentencing body, without subjecting himself to cross-examination"); see also *Homick v. State*, 825 P.2d 600, 604 (Nev. 1992) ("Allocution has been viewed as the right of the defendant to stand before the sentencing authority and present an unsworn statement . . ."); Thomas, *supra* note 8, at 2667.

⁸⁶ See, e.g., Thomas, *supra* note 8, at 2668-69 (recognizing that defendants' stories may be untrue and judges may simply assume, correctly or not, that defendants' stories are true or false). The lack of force of unsworn statements not subject to cross-examination can be highlighted by a Georgia statute that makes defendants incompetent to testify under oath on their own behalf or be subject to cross-examination. These unsworn statements are

not treated as evidence or like the testimony of the ordinary sworn witness. "The statement . . . is something different from the evidence, and to confound one with the other, either explicitly or implicitly, would be confusing, and often misleading. The jury are to deal with it on the plane of statement and not on the plane of evidence, and may derive from it such as they can in reaching the truth. The law fixes no value upon it; it is a legal blank. The jury may stamp it with such value as they think belongs to it."

Ferguson v. Georgia, 365 U.S. 570, 587-88 (1961) (quoting *Vaughn v. State*, 16 S.E. 64, 66 (Ga. 1892); see also *Allen v. State*, 22 S.E.2d 65, 65 (Ga. 1942) ("You have the right to reject the statement entirely if you do not believe it to be true."); *Douberly v. State*, 192 S.E. 223, 225 (Ga. 1937) (where jury was told it could credit the statement "provided they believe it to be true"). Although the Georgia statute is in the context of defendants testifying at trial, the same lack of force of unsworn statements can be applied to defendants' statements during allocution, which also lacks evidentiary safeguards.

⁸⁷ See *Townsend v. Burke*, 334 U.S. 736, 741 (1948) ("It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false . . .").

⁸⁸ See, e.g., *State v. Bunner*, 453 N.W.2d 97, 103 (Neb. 1990) ("[T]he most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence." (internal quotation marks omitted) (quoting *State v. Barker*, 436 N.W.2d 520, 524 (Neb. 1989)); *State v. Chow*, 883 P.2d 663, 672 (Haw. Ct. App. 1994) (holding allocution "provides offenders the opportunity to contest any disputed factual basis for sentencing

otherwise subject to stringent truth-testing.⁸⁹ Although courts explicitly recognize that allocution is vital to truth-finding,⁹⁰ they are also adamant that allocution offer a defendant the “opportunity to ‘present all available *accurate* information

and [to] persuade the judge to choose a favored sentence alternatively” (internal quotation marks omitted) (quoting ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 9:5, at 245 (2d ed. 1991))). An example of a full allocution:

“[S]orry” is not going to change or help anything. Putting the pictures up was just to help show my friends not to do anything stupid, to always buckle up because it does help occasionally. The tattoo, I mean, she was a friend. I mean, I want to remember her, and I don’t want to ever forget it. I live with it everyday. I can’t not. I see it in dreams, and I see it when I wake up. I see it on the road everyday. People fly by and the picture comes back. There’s not a day that I have forgotten it. I mean, you ask any of my friends now. I mean, I drive the safest possible—I mean, five below the speed limit. They say I’m the safest now ever. I mean, I was young; I was stupid. I didn’t know any better. I mean, you don’t think that something like this could change you, but it does a lot. And I just hope you do the right thing in making your decision.

State v. Guy, 2008 WL 5130729, at *3 (Tenn. Crim. App. Dec. 8, 2008). Another example of an extremely fact-based allocution:

[D]efendant told the court of his struggles with crack cocaine addiction, his need for money to visit a sick relative, his prior military service in the United States Marine Corps, his attempt to enroll in a drug treatment program, his religious conversion, the eight months of sobriety since his incarceration, his attempts to be a good influence on his fellow inmates, and his “willing [ness] to do whatever it takes to keep my life clean and sober.”

State v. Kennedy, 2004 WL 1920786, at *3 (N.C. Ct. App. Apr. 6, 2004); *see also* *State v. Arnold*, 2009 WL 2106019, *2 (Ohio Ct. App. Jul. 17, 2009) (“Exercising his right of allocution, [the defendant] informed the court that he had been using drugs daily for eight or nine months and that he recognized that he had hurt those who love him with his drug use. [The defendant] stated, ‘I’m not a bad person. And never robbed, stole, or killed for my drugs. I just know now what’s more important to me, and that’s my family.’”). Significantly, sometimes the State will rely on allocution to justify aggravating a sentence. *See* *People v. Smith*, 58 A.D.3d 888, 889, 871 N.Y.S.2d 452, 453 (3d Dept. 2009) (“To justify consecutive sentences in this context, the People had to establish through either the indictment or the facts adduced during the allocution that the images at issue “came into defendant’s possession at separate and distinct times.”).

⁸⁹ JOHN HOSTETTLER, *FIGHTING FOR JUSTICE: THE HISTORY AND ORIGIN OF ADVERSARY TRIAL* 9-10 (2006) (“[T]he fundamental expectation of an adversarial system is that out of a sharp clash of proofs presented by litigants in a highly structured forensic setting will come the information upon which a neutral and passive decision maker can base a satisfying resolution of the legal dispute.” (quoting Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 499 (1990) (internal quotation marks omitted))).

⁹⁰ *See, e.g.,* *Shelton v. State*, 744 A.2d 465, 493 n.121 (Del. 2000) (“[R]eason for allocution is to improve truth-finding process by considering comments from defendant’s perspective.” (citing *Shifflett v. State*, 554 A.2d 814, 817 (Md. 1989)); *Thanos*, 622 A.2d at 732 (Md. 1993) (“[T]he *raison d’être* of allocution as it exists in Maryland is to improve the truth-finding process by considering comments from the defendant’s perspective.” (citing *Shifflett*, 554 A.2d at 817)).

bearing on mitigation of punishment.”⁹¹ Yet, how does truth-testing occur, and how is “*accurate* information” obtained when allocution employs no traditional truth-testing procedures? Without oaths and without cross-examination, no evidentiary mechanisms are in place to test the credibility of a defendant’s testimony. As a result, accuracy can only be a lofty goal when information elicited during allocution is neither verified, rebutted, nor subject to correction.⁹²

The individualization of sentencing accuracy fares no better. As an initial matter, judges tend to be quite liberal in finding compliance with allocution—evidencing a failure both to take allocution seriously and to weigh information thoroughly.⁹³ If judges do not currently consider allocution to be a right that is fundamental enough to be formally and unequivocally afforded, one must ask: How seriously are judges considering the words spoken in fashioning so-called individualized punishments when the right is actually afforded?

For example, when one court recognized that the right to allocution was not given in accordance with “better practice,” it nevertheless found that the defendant was not denied her right.⁹⁴ Similarly, when a court cut off a defendant’s statement before completion (indicating that the judge was not inclined to value the information), there was also no error.⁹⁵ In another instance, a defendant was mistaken as to the type of information he was allowed to provide and, thus, did not speak

⁹¹ See, e.g., *United States v. Gunning*, 401 F.3d 1145, 1147 (9th Cir. 2005) (quoting *United States v. Mack*, 200 F.3d 653, 658 (9th Cir. 2000)) (emphasis added); see also *United States v. Sanchez-Castro*, 286 F. App’x. 1001, 1002 (9th Cir. 2008) (noting that the law requires a defendant be able to “fully present all available accurate information bearing on mitigation of punishment . . .”) (quoting *Mack*, 200 F.3d at 658 (internal quotations omitted)).

⁹² *CHURGIN ET AL.*, *supra* note 24, at 3. This problem is merely exacerbated by the fact that virtually none of the other information, such as that in a pre-sentence report, is subject to factual challenges. *Id.* at 3 (“Reasons for sentences are not required, nor is the information on which the judge may be relying necessarily disclosed to the accused or his counsel for correction or rebuttal. Putting it bluntly, there is no requirement that the sentence have any rational basis whatsoever.”).

⁹³ *Barnett*, *supra* note 50, § 3 (“Where the requirement of allocution is imposed by statute or court rule . . . the courts . . . have been rather liberal in finding a compliance . . .”); see, e.g., *United States v. Barnes*, 948 F.2d 325, 328 (7th Cir. 1991) (where trial judge moved directly to sentencing and did not afford defendant a right to speak).

⁹⁴ See, e.g., *State v. Johnson*, 245 S.W.3d 288, 296-97 (Mo. Ct. App. 2008).

⁹⁵ See, e.g., *Wilson v. State*, 155 P.3d 1009, 1012-13 (Wyo. 2007).

to individualizing facts and circumstances.⁹⁶ Despite this, since the transcript indicated that allocution was technically afforded, again, there was no error.⁹⁷ In other words, regardless of whether a defendant actually provides personal information, courts may simply presume that the right to allocution is satisfied.⁹⁸ Even more troubling is when a court concludes that a defendant received her right to allocution when the record glaringly suggests otherwise.⁹⁹ However, the most disconcerting examples are when a judge fails to afford the right to allocute before imposing a sentence,¹⁰⁰ or when a judge is predisposed to

⁹⁶ See *O'Neill v. State*, 153 P.3d 38, 44 (Nev. 2007). In *O'Neill*, after the district court judge asked the defendant, "O'Neill, would you like to say anything?" he began to speak. *Id.* (internal quotation marks omitted). Rather than addressing any personal facts or circumstances relevant to mitigating or individualizing punishment, the defendant thought the court asked him to address any errors in his pre-sentence investigation report only. *Id.* Accordingly, the defendant proceeded to note only various errors in the report, and made no other remarks. *Id.*

⁹⁷ *Id.* ("While O'Neill may have mistakenly believed that the district court only asked him to address the errors in the report, the transcript suggests that the district court asked O'Neill to address the court regarding any issues. Going further, the record clearly indicates that the district court addressed O'Neill as mandated by NRS 176.015(2)(b).").

⁹⁸ See, e.g., *United States v. Flores*, 959 F.2d 83, 88 (8th Cir. 1992) (holding that the trial court's request that defendant rise and asking him, "Do you know of any reason why the court should not pronounce sentence? That is, are you ready to receive the Court's sentence?" to which defendant replied, "Yes, sir," satisfied right of allocution afforded under Federal Rules of Criminal Procedure 32(a)(1)(c)); *United States v. Scallion*, 533 F.2d 903, 920 n.20 (5th Cir. 1976) ("[Since the appellant] gave no indication that [he] . . . wished to make an additional statement . . . [w]e conclude that [the appellant] was accorded the benefit of the rule."); see also *Marshall*, *supra* note 5, at 215 ("Although many appellate courts acknowledge that the right to speak before is an important right in the abstract, very few cases are remanded for resentencing even though the trial court's obligation was not fulfilled. The appellate courts often find that the requirement was satisfied in some way or that no substantial harm was done by the omission."). Sometimes, when the right to allocution is not properly afforded, courts nevertheless deem the error to be harmless, which similarly deprives the defendant of the right to allocute. See *United States v. Bebig*, 302 F.2d 335, 337 (4th Cir. 1962).

⁹⁹ *CAMPBELL*, *supra* note 5, at 410 ("Sometimes, when appellate courts confront a record that says nothing about allocution, they resolve the issue of silence with the presumption all proper procedures were followed.").

¹⁰⁰ See, e.g., *Gordon v. United States*, 438 F.2d 858, 880 (5th Cir. 1971); *State v. Gervasi*, 69 P.3d 1074, 1076 (Idaho Ct. App. 2003). Although the district court judge acknowledged that the defendant had the right to personally address the court, the court did not actually afford the defendant the right to allocute. See *Gervasi*, 69 P.3d at 1076. Instead, the court allowed both counsel to address the court and then simply proceeded to impose a sentence. *Id.* Significantly, the court did not bother to offer the defendant the opportunity to allocute until after he imposed the defendant's sentence and the defendant was being escorted out of the courtroom. *Id.*; see also *United States v. Carper*, 24 F.3d 1157, 1162 (9th Cir. 1994) (where court never asked defendant whether he wanted to speak and defendant said nothing); *State v. Shackel*, No. 26828-4-III, 2009 WL 44820, at *1 (Wash. Ct. App. Jan. 8, 2009) ("During the sentencing hearing, the court imposed a 57-month sentence, and then noted it failed to allow allocution.").

imposing a particular sentence before hearing the defendant's allocution.¹⁰¹

As illustrated, in practice, judges rarely use the individualized information provided during allocution, or choose instead to accord it negligible weight. Some judges even fail to allow a defendant to provide such information. Such inconsistent practices necessarily thwart allocution's aim of individualized sentences, thereby frustrating sentencing accuracy as well.¹⁰² This cavalier approach thus renders the aim of promoting accuracy by mitigating and individualizing sentences virtually unattainable. However, courts and legislatures should not simply accept this state of discord. Rather, these problems only highlight the necessity for significant evidentiary reform—namely, mandating oaths prior to allocution and permitting cross-examination to further allocution's goal of sentencing accuracy.

2. Enhancing Perceived Equity: The Humanization and Legitimization Justification

Although the goal of sentencing accuracy is frustrated under current allocution procedure, allocution has yet another modern theoretical justification.¹⁰³ The very act of allocuting can potentially serve the more intangible purpose of humanizing sentencing proceedings, thereby enhancing the "perceived equity" of the process.¹⁰⁴ This humanization rationale can be

¹⁰¹ See, e.g., *United States v. Barrett*, 552 F.3d 724, 728 (8th Cir. 2009) ("After indicating its intention to impose a 120-month sentence on Count 1, the district court allowed Barrett an opportunity to speak."); *United States v. Jamal*, 229 F. App'x. 569, 570 (7th Cir. 2008) (explaining that "[a]lthough allocution must precede the imposition of sentence, no rigid procedure must be followed" and, even though a judge contemplated the sentence prior to allocution, the defendant's right to allocution was not violated); *United States v. Boose*, 403 F.3d 1016, 1017 (8th Cir. 2005) (where district court was already predisposed to sentencing the defendant to 270 months before hearing the defendant's statement).

¹⁰² *CHURGIN ET AL.*, *supra* note 24, at 94 ("Our proposed sentencing procedure replaces the present anarchy with a structured, rational and purposeful system designed to preserve our commitment to individualized sentencing while procuring sentences fairer to defendants and to society.").

¹⁰³ *Thomas*, *supra* note 8, at 2666 ("Humanization [theory] takes the individualization of the defendant as its starting point.").

¹⁰⁴ See, e.g., *McGautha v. California*, 402 U.S. 183, 220 (1971) ("As to the largely symbolic value represented by the latter interest, Ohio has provided for retention of the ritual of allocution, albeit only in its common-law form, precisely to avoid the possibility that a person might be tried, convicted, and sentenced to death in complete silence."); *Shifflett v. State*, 554 A.2d 814, 817 (Md. 1989) ("[A]llocution promotes the appearance of justice by making it clear that the sentencing court is receptive to persuasive remarks of all concerned."); see also *Giannini*, *supra* note 8, at

traced to the origins of allocution when the right permitted a defendant to speak personally to a court and to explain conduct even when punishment was strictly standardized.¹⁰⁵ Today, allocution has the potential to both create a similar “therapeutic effect”¹⁰⁶ from the defendant’s perspective and to enhance the “perceived equity” of sentencing proceedings from an institutional perspective.¹⁰⁷

From the defendant’s perspective, allocution *potentially* humanizes the sentencing process and gives the defendant a chance to speak her mind.¹⁰⁸ Indeed, because allocution is more expansive today—that is, defendants are no longer confined to strictly defined legal excuses¹⁰⁹—allocution can serve as a “therapeutic outlet.”¹¹⁰ This “therapeutic outlet” can provide a meaningful platform for a defendant to express remorse and regret, which is beneficial to the defendant, to her victim, and to society.¹¹¹ Toward this end, allocution permits a “wider range

475 (“The defendant’s voice adds an intangible but important ‘something’ to the proceedings.”). This justification is arguably “intangible” because, undoubtedly, “contributions are . . . validated by the mere fact that she was heard in an official forum.” *Id.* at 433; *see also* Jon M. Sands, *Allocution in Federal Sentencing: The Right of a Rite*, CHAMPION, March 1999, at 43 (“Even if this falls on deaf ears, and the court imposes a sentence seemingly unmoved by allocution, the defendant will at least have had a chance to express his self-respect, and to stand as an individual before the court. For no other reason, the defendant must be allowed to clothe himself with dignity.”).

Scholars are also beginning to acknowledge the inadequacies of a mitigation theory and are shifting to different justifications. *See, e.g.*, Giannini, *supra* note 8, at 474 (“There are sound reasons to look beyond a mitigation or relevancy theory to support defendant allocution . . . [since] the approach has its limits.”); Thomas, *supra* note 8, at 2666 (“If allocutions focused on mitigation can be futile, inflexible and flawed, humanization provides an alternative perspective.”).

¹⁰⁵ Thomas, *supra* note 8, at 2667.

¹⁰⁶ State v. Brockman, 168 N.W.2d 367, 368 (Neb. 1969).

¹⁰⁷ *See* United States v. Barnes, 948 F.2d 325, 328 (7th Cir. 1991) (“Aside from its practical roles in sentencing, the right has value in terms of ‘maximizing the perceived equity of the process.’”) (citations omitted); *see also* Giannini, *supra* note 8, at 475 (recognizing that “[i]t is difficult . . . to conceive of an American legal system that renders punishment without granting the party facing punishment one final opportunity to be heard”).

¹⁰⁸ Thomas, *supra* note 8, at 2667. To be sure, however, many defendants’ primary aims are still to achieve a lesser sentence and will indeed present mitigating factors towards this end. *Id.*

¹⁰⁹ *Id.* at 2646; *see also supra* notes 30-32 and accompanying text.

¹¹⁰ Giannini, *supra* note 8, at 433, 475 (noting that allocution allows a defendant to participate in “one of the weightiest of our community rituals,” and “her presence and observations are deemed an important part of the legal process”); *see also* Brief of Petitioner-Appellant at 10, State v. Petit, 648 N.W.2d 193 (Mich. 2002) (No. 119348) (stating that some courts have maintained that allocution has survived more for its therapeutic effect than any practical effect).

¹¹¹ *See* Brief of Petitioner-Appellant at 8, State v. Petit, 648 N.W.2d 193 (Mich. 2002) (No. 119348); *see also* Myers, *supra* note 69, at 805 (“Allocution can give a

of stories and voices” and legitimizes a “broader range of speech” than when the right originated.¹¹² Further, allowing the defendant to speak on her own behalf gives her an opportunity to participate meaningfully in her own criminal proceeding and to exercise her freedom to speak.¹¹³ In essence, the defendant can participate in a weighty societal ritual in which her presence and her observations serve as crucial aspects of the process.¹¹⁴ In turn, allocution has the potential to make the defendant feel as if she is more than a “faceless, silent abstraction”¹¹⁵ and, indeed, a human being.

From an institutional perspective, allocution can also contribute to the perceived legitimacy and equity of sentencing.¹¹⁶ Essentially, because allocution permits judges to sentence based on factors beyond the defendant’s crime, this right allows a judge to restore the defendant’s human qualities. Consequently, the right to allocution gives the judge an opportunity to treat the defendant as more than a criminal deviant.¹¹⁷ By giving the defendant a “final chance to say something . . . to influence the judge,”¹¹⁸ sentencing proceedings can gain more respect. Indeed, enhancing perceived equity is institutionally important because perceptions and outward

defendant the chance to atone publicly for his crime, and in this sense, could have a moral and psychological value that goes beyond trial strategy.”).

¹¹² Thomas, *supra* note 8, at 2667.

¹¹³ Valenzuela, *supra* note 8, at 2.

¹¹⁴ Giannini, *supra* note 8, at 433.

¹¹⁵ Thomas, *supra* note 8 at 2671. *See* United States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994) (recognizing that allocution is valuable in maximizing the perceived equity of sentencing); *see also* Myers, *supra* note 69, at 804 (“Because defendants are often seen only as agents of senseless violence, the only way the defense can make a jury reconsider a death sentence may be ‘to humanize the defendant for the jury, to induce greater moral doubt in the jurors’ minds by reminding them that they are deciding the fate of a person, not a legal abstraction.” (quoting Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 311 (1984))).

The humanizing rationale applies equally to victims’ and defendants’ statements. Victims’ rights advocates argue that statements can have a “cathartic effect[,]” analogous to defendants’ statements. Thomas, *supra* note 8, at 2667; *see also* Giannini, *supra* note 8, at 475.

¹¹⁶ *See, e.g.*, Giannini, *supra* note 8, at 433; Marshall, *supra* note 5, at 222.

¹¹⁷ Valenzuela, *supra* note 8, at 1.

¹¹⁸ *Id.* at 9 (“The judge permits the defendant ‘to have the last word, the final chance to say something, anything, to influence the judge, to present a human face to the cold calculations of the guidelines, and to gain self-respect before sentence is imposed.’”) (quoting Sands, *supra* note 104, at 43). *See, e.g.*, United States v. Quintana, 300 F.3d 1227, 1231 (11th Cir. 2002) (“[R]egardless of the outcome, allocution helps ‘maximiz[e] the perceived equity of the [sentencing] process.’”) (quoting United States v. Dabeit, 231 F.3d 979, 981 (5th Cir. 2000) (per curiam), *cert. denied*, 531 U.S. 1202 (2001)).

appearances often influence judicial action.¹¹⁹ For example, when one judge failed to provide the right to allocution, the reviewing court merely evaluated whether or not the error affected the “integrity or public reputation of judicial proceedings[,]”¹²⁰ thus highlighting allocution’s aim of enhancing the “perceived equity” of sentencing.

a. Enhancing Perceived Equity Justification Is Untenable

Unfortunately, just as allocution’s historical justification and modern rationalization of promoting sentencing accuracy are moot, allocution’s goal of enhancing the “perceived equity” of punishment is also irreconcilable with the current attitude of the courts. This disparity negates any semblance of legitimacy or humanity in sentencing. Like the inability to further allocution’s accuracy objective, allocution’s failure to achieve perceived equity results from an inadequate form of allocution, which is in dire need of significant evidentiary reform.

As noted, judges recognize that a defendant may provide incomplete and inaccurate information during sentencing,¹²¹ and the lack of oaths and cross-examination during allocution only aggravates the situation. The recognition that sentencing information is often incomplete or inaccurate leads to two unfair and sub-optimal outcomes. First, it has become common for a judge to consider the extent to which a defendant expresses remorse for her behavior,¹²² thereby detracting from the actual words spoken.¹²³ Second, judges may rely on

¹¹⁹ For example, the “plain error” doctrine “tempers the blow of a rigid application of the contemporaneous-objection requirement” and is codified in the FEDERAL RULES OF CRIMINAL PROCEDURE 52(b). *See* United States v. Young, 470 U.S. 1, 15 (1985). However, when there is a failure to contemporaneously object at trial, an appeals court will “sparingly” apply this doctrine to review only errors that “seriously affect the fairness, integrity or public reputation of judicial proceedings[.]” *Id.* at 15 (internal quotations omitted).

¹²⁰ United States v. Coleman, 280 F. App’x. 388, 392 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 900 (2009). Significantly, in *Coleman*, the court concluded that “the right to allocution ‘is not a fundamental defect that inherently results in a complete miscarriage of justice nor an omission inconsistent with the rudimentary demands of fair procedure.’” *Id.*

¹²¹ SPOHN, *supra* note 10, at 118-19.

¹²² *Id.* at 118.

¹²³ In fact, some courts have even “condemned the use of an offender’s failure to admit guilt and refusal to demonstrate remorse, some invalidating any severity traceable to either impermissible factor.” CAMPBELL, *supra* note 5, at 377 (citing United States v. Heubel, 864 F.2d 1104, 1110 (3d Cir. 1989)).

stereotypes or other factors with no bearing on sentencing,¹²⁴ ultimately leading to unsound sentencing. Judges may feel justified—albeit, illegitimately—in relying on irrelevant factors when the only other relevant information may be inaccurate anyway.¹²⁵ Thus, allocution ultimately turns not on the facts the defendant asserts; rather, it merely provides defendants with the chance to display acceptable demeanor, and gives judges the freedom to listen to what they want. Consequently, allocution cannot humanize or legitimize sentencing; instead, it does the opposite.

During allocution, judges currently prefer to hear from a remorseful defendant who accepts responsibility for her actions¹²⁶ over other more substantive facts that should legitimately impact sentences. In addition, judges subjectively

¹²⁴ *Id.* at 119. For example,

men may be perceived as more dangerous than women, younger offenders may be regarded as more crime prone than older offenders, gang members may be viewed as more threatening than non-gang members, the unemployed may be seen as more likely to recidivate than the employed, and those who abuse drugs or alcohol may be viewed as less amenable to rehabilitation than those who abstain from using drugs or alcohol.

Id.

¹²⁵ *Id.*

The fact that the information judges have is typically incomplete and the predictions they are required to make are uncertain helps explain why . . . legally irrelevant characteristics of race, gender and social class, influence sentencing decisions. Because they don't have all the information they need to fashion sentences to fit crimes *and* offenders, judges may resort to stereotypes of dangerousness and threat that are linked to offender characteristics.

Id.

¹²⁶ U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 provides:

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2008); *see also* Scott v. United States, 419 F.2d 264, 267 (D.C. Cir. 1969) (where a trial judge stated that “I hope sometime I hear some defendant say, ‘Judge, I am sorry, I am sorry for what I did.’ That is what I have in mind.”); Sands, *supra* note 104, at 34 (“[T]he judge expects to hear remorse and regret. In giving and expressing sorrow, the phrasing should be short and sweet. ‘I am sorry.’”).

evaluate the appropriateness of a defendant's conduct,¹²⁷ such as "[her] attitude and demeanor."¹²⁸ For example, in one case, *United States v. Li*, the defendant failed to convey an acceptable sentiment during allocution, which resulted in a more stringent sentence.¹²⁹ Specifically, during the defendant's attempt to allocute, the judge interrupted her and stated:

[T]his defendant is absolutely unwilling to recognize or accept responsibility for what she has done I was persuaded to give her a sentence at the low end of the guideline range, but her allocution has persuaded me that, in view of her absolute unwillingness to accept responsibility . . . a sentence in mid-guideline range would be proper.¹³⁰

This result does not enhance "perceived equity," or give the defendant a legitimate platform to plead leniency in any way. The defendant cannot meaningfully participate in her criminal proceeding if courts do not legitimize her *speech*, but rather choose to focus on her *appearance*. Yet, absent truth-testing mechanisms during allocution, judges will inevitably continue to adopt similar attitudes because they have no assurance that a defendant's statement is credible or accurate.¹³¹ This deficiency is what urges judges to look toward remorse¹³² and other conduct as alternative measurements for punishment. Subjective decision-making in sentencing is thus intensified because judges have no objective approach for determining the presence or absence of remorse.¹³³ Accordingly, defendants

¹²⁷ U.S. SENTENCING GUIDELINES MANUAL § 1B1.4.

¹²⁸ *United States v. Li*, 115 F.3d 125, 135 (2d Cir. 1997).

¹²⁹ *See id.* at 135.

¹³⁰ *Id.* Although initially emotional during her allocution, the defendant subsequently told the judge: "I don't want to show this emotion to you in front of your Honor." *Id.* at 131. Why she decided she did not want to show her emotion anymore is unknown, but the fact that the defendant wanted to remain composed and more stoic after having already shown that she was emotional, should not permit a judge to discount her allocution testimony because she was allegedly "unwilling to recognize or accept responsibility . . ." *See id.* at 135.

¹³¹ *See, e.g.,* Thomas, *supra* note 8, at 2668-69 (recognizing that defendants' stories may sometimes be untrue and additionally, judges may simply assume, correctly or not, that a defendant's stories are true or false).

¹³² Remorse is "a feeling of compunction, or of deep regret and repentance, for a sin or wrong committed." Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 133 (2006) (internal quotation marks omitted) (quoting OXFORD ENGLISH DICTIONARY Vol. XIII, at 598 (2d ed. 1989)).

¹³³ *See* Ward, *supra* note 132, at 132. Indeed, remorse is ambiguous, and judges cannot apply it with any consistency. *Id.* at 131 (recognizing that the concept of remorse cannot be applied "in any coherent or consistent manner."). For example,

[p]rosecutors may confront a savvy criminal defendant who is not remorseful, but who claims remorse in order to obtain a reduced sentence and is

cannot benefit equally from allocution, and worse yet, many are prejudiced.¹³⁴ Moreover, the lack of sound judicial reasoning and concrete foundation for decision-making further undermines allocution's aim of enhancing the "perceived equity" of sentencing and court proceedings in general.¹³⁵ Indeed, no actual or apparent equity can or will result when subjectivity and inconsistency continue to dictate crucial sentencing determinations.

In one startling instance, the glaring absence of traditional evidentiary safeguards in allocution also served as ammunition for the prosecutor to attack the defendant's statement before the sentencing body even had the opportunity to consider it. In *Booth v. Maryland*,¹³⁶ the State was permitted to "contrast[] [the defendant's] allocution with the elevated level of evidence which is sworn testimony subject to cross-examination."¹³⁷ Shockingly, the State could undermine the defendant's credibility simply because there was no evidentiary mechanism to test it. Such an inequitable outcome, coupled with judges' premature notions of the effects on punishment, further underscores allocution's inability to enhance the "perceived equity" of sentencing. It also lends more credence to the necessity of reforming allocution with oaths and cross-examination in order to check unwarranted judicial discretion.

proficient in saying the right things before a susceptible judge. Defenders face a perceived lack of remorse, which may result in a [lengthier] sentence for the defendant who is inarticulate or fails to behave or speak in the manner the judge believes indicates remorse.

Id.

¹³⁴ See Marshall, *supra* note 5, at 221 ("If a defendant is eloquent and remorseful, and there are mitigating circumstances, of which he has for some reason not already informed his counsel, then allocution can be a safeguard. However, when the defendant is eloquent or not remorseful it is highly unlikely that he will shed any light on mitigating circumstances.").

¹³⁵ Carl F. Pinkele, *Discretion and Judicial Sentencing*, in DISCRETION, JUSTICE AND DEMOCRACY: A PUBLIC POLICY PERSPECTIVE 60 (Carl F. Pinkele & William C. Louthan eds., 1985) ("As citizens and as those immediately affected by judicial behavior, we need access to judicial rationales and reasoning in order to respond to a judge's general performance . . .").

¹³⁶ *Booth v. State*, 507 A.2d 1098 (Md. 1986), *vacated in part on other grounds* by *Booth v. State*, 482 U.S. 496 (1987).

¹³⁷ *Booth*, 507 A.2d at 1112. Since the State did not tell the jury it could not consider Booth's allocution, the State was allowed to attack the defendant's credibility. *Id.*

II. CURRENT FEDERAL AND STATE PROVISIONS FOR THE RIGHT TO ALLOCUTION

In spite of current problems, allocution should not be dismissed out of hand. Indeed, the prevalence of federal and state statutory provisions for allocution illustrates the lingering prominence of the right.¹³⁸ Legislatures should recognize this prominence and reformulate a model for allocution to better serve defendants and sentencing bodies. This Part examines the right to allocution in federal and state courts, emphasizing a recent California case, *People v. Evans*,¹³⁹ which I argue should be the model for reforming allocution nationally.

A. *Federal and State Provisions for the Right to Allocution*

In federal court, a defendant's right to allocution is a matter of criminal procedure, and although it is an "absolute right," it is not necessarily a constitutional one.¹⁴⁰ The right is codified in Federal Rule of Criminal Procedure 32.¹⁴¹ The provision provides, in relevant part, that prior to imposing a sentence, a court must "address the defendant personally in order to permit the defendant to speak or present any

¹³⁸ Allocution was so important that the English common law right was incorporated into U.S. criminal procedure. Dawson, Jr., *supra* note 26, at 118 ("Since the safeguard was so firmly established in English courts, it was duly incorporated into American criminal procedure . . .").

¹³⁹ *People v. Evans*, 187 P.3d 1010 (Cal. 2008).

¹⁴⁰ The Supreme Court has not explicitly held whether denial of the right to allocution is a constitutional violation, but has addressed it in passing. *See Hill v. United States*, 368 U.S. 424, 428 (1962); *see also McGautha v. California*, 402 U.S. 183, 220 (1971) ("We have held that failure to ensure such personal participation in the criminal process is not necessarily a constitutional flaw in the conviction.").

The federal circuit courts are currently split on the issue of whether the right to allocution should be a constitutional guarantee. *See, e.g., United States v. Fleming*, 849 F.2d 568, 569 (11th Cir. 1998) (holding that the right to allocution is not of constitutional dimension); *Boardman v. Estelle*, 957 F.2d 1523, 1525-26 (9th Cir. 1992) (holding allocution is a constitutionally guaranteed right through due process but limited to circumstances when a defendant asks to allocute); *United States v. Moree*, 928 F.2d 654, 656 (5th Cir. 1991) (stating that the right to allocute at sentencing is of constitutional dimension); *United States v. Coffey*, 871 F.2d 39, 40 (6th Cir. 1989) (noting that the right to allocution is not of constitutional dimension); *Ashe v. State of North Carolina*, 586 F.2d 334, 336 (4th Cir. 1978) (noting that a defendant has no constitutional right to be asked to allocute, but if he requests the opportunity, "it is a denial of due process not to grant the request").

¹⁴¹ The codification represents a "considerable extension of the prevailing common law application." Dawson, Jr., *supra* note 26, at 118. The Federal Rules of Criminal Procedure was recently amended by US Order 08-21. However, the specific provision for allocution remains unchanged.

information to mitigate the sentence.”¹⁴² As the statute imposes no limitation on permissible excuses, a defendant is theoretically permitted to present “any information” to mitigate the punishment. In practice, however, allocution is not so unlimited.¹⁴³ For example, a defendant may not allocute in camera, reargue legal contentions, or criticize the court.¹⁴⁴ Despite these limitations, Rule 32 did expand allocution from its historical common law form by applying the right to both capital and non-capital felonies, as well as misdemeanors.¹⁴⁵

1. The Federal Right to Allocution: *Green v. United States*

The United States Supreme Court’s seminal decision on the right to allocution is *Green v. United States*,¹⁴⁶ which

¹⁴² FED. R. CRIM. P. 32(i)(4)(A)(ii). The federal statute also provides the opportunity for various other parties to speak before sentence is imposed on convicted defendants. In its entirety, FED. R. CRIM. P. 32(i)(4)(A) provides:

Before imposing sentence, the court must:

- (i) provide the defendant’s attorney an opportunity to speak on the defendant’s behalf;
- (ii) address the defendant personally in order to permit defendant to speak or present any information to mitigate the sentence; and
- (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant’s attorney.

FED. R. CRIM. P. 32(i)(4)(A).

¹⁴³ See *United States v. Mack*, 200 F.3d 653, 658 (9th Cir. 2000) (“[A]lthough the [appellants have] a right of allocution at sentencing, that right is not unlimited.”); *People v. Evans*, 187 P.3d 1010, 1016 (2008) (“The court may refuse to hear evidence pertaining to peripherally relevant matters that will not affect the court’s exercise of its sentencing discretion, or testimony that merely restates information contained in statements to the probation officer.”).

¹⁴⁴ See *United States v. Carter*, 355 F.3d 920, 926 (6th Cir. 2004) (statements contesting matters previously raised and decided against the defendant are not proper during allocution); *United States v. Eibler*, 991 F.2d 1350, 1356 (7th Cir. 1993) (noting that defendant was entitled to right to allocute, but not to allocute in camera); *United States v. Muniz*, 1 F.3d 1018, 1025 (10th Cir. 1993) (allocution is not the time to reargue facts or law); *United States v. Kellogg*, 955 F.2d 1244, 1250 (9th Cir. 1992) (right to allocution is limited to statements designed to mitigate sentence, which does not include criticizing tax law, the national debt problem, or the fall of Eastern Europe); see also *Sands*, *supra* note 104, at 46 (“The defendant should be cautioned against blaming others, or starting a vitriolic harangue against either law enforcement, confidential informants (i.e., snitches) or crime victims.”).

¹⁴⁵ *Dawson, Jr.*, *supra* note 26, at 118 (noting that the statute applies “not only to capital felonies but to all other felonies and even to misdemeanors, fields not generally reached by common law allocution”).

¹⁴⁶ *Green v. United States*, 365 U.S. 301 (1961). This decision consolidated two separate actions. *Id.* at 303. In addition to addressing the statutory right to allocution, the Court examined the legality of a twenty-five-year sentence imposed after “the judge

addressed the issue of whether a trial judge is inflexibly required to address a defendant with an allocutory inquiry.¹⁴⁷ The Court concluded that the drafters of Rule 32 “intended that [a] defendant be personally afforded the opportunity to speak before imposition of sentence.”¹⁴⁸ While criminal proceedings had undergone significant changes, the Court believed that allocution should persist *if the original justifications remained*.¹⁴⁹ Ultimately, the Court concluded that no change was significant enough to lessen a defendant’s need to personally present information in mitigation of her sentence, reasoning that “[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.”¹⁵⁰ Thus, Rule 32 currently affords defendants the right “to make a statement in [her] own behalf,’ and ‘to present any information in mitigation of punishment.”¹⁵¹

Since *Green*, the Supreme Court has not addressed the right to allocution in much depth.¹⁵² However, lower federal courts have paid considerably more attention to allocution and “have been emphatic that Rule 32 be applied ‘quite literally’”—indeed, counsel’s opportunity to speak is generally insufficient and a judge has a duty to listen carefully to a

had imposed a twenty-year sentence under another count of the indictment for the same offense without the elements of aggravation.” *Id.*

In *Green*, the lower court convicted the defendant on a three-count indictment charging him with “entering a bank with intent to commit a felony,” “robbing the bank,” and “assaulting or putting in jeopardy the lives of persons by use of a dangerous weapon while committing the robbery.” *Id.* at 302. At sentencing, the lower court imposed a twenty-year sentence on Count 1, a twenty-year sentence on Count 2, and a twenty-five year sentence on Count 3. *Id.* The defendant claimed that his sentence was illegal because the district court judge failed to directly ask him if he had anything to say prior to sentencing. *Id.* at 303. The judge did ask *counsel*, “Did you want to say something?” *Id.* at 302. *Counsel* spoke about defendant’s age, family, and physical condition. *Id.* The lower court’s sentence was ultimately challenged in the Supreme Court for review. *Id.* at 302-03.

¹⁴⁷ *Id.* at 303.

¹⁴⁸ *Id.* at 304. The Court reached this conclusion by deferring to the history of a defendant’s right to allocution. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* The Court further concluded that affording defense counsel the opportunity to speak does not satisfy the right as to the convicted defendant. *Id.* Nevertheless, the Court did not find that the lower court had denied the right to *Green* because the judge’s question, “Did you want to say something[,]” could have been directed to defendant himself. This did not sufficiently show that defendant’s right to speak on his own behalf was violated. *Id.* at 305.

¹⁵² Giannini, *supra* note 8, at 462.

¹⁵³ *Id.*

defendant's allocation.¹⁵⁴ Accordingly, allocation should not be viewed as merely an "empty ritual."¹⁵⁵ However, despite the general acceptance among federal courts following *Green*, some courts still consider allocation to be "outmoded" and unnecessary,¹⁵⁶ which is a further testament to the need for significant reform.

2. The State Right to Allocation

For the states, one main issue is whether a particular jurisdiction even recognizes the right to allocation.¹⁵⁷ The right may arise "under [a state's] constitution,¹⁵⁸ common law, statutes or court rules[.]"¹⁵⁹ In most states, however, allocation is codified in statutes or court rules, which exemplify its prominence.¹⁶⁰ In other jurisdictions, "allocation . . . [is]

¹⁵⁴ See, e.g., *United States v. Mack*, 200 F.3d 653, 657 (9th Cir. 2000); see also *Giannini*, *supra* note 8, at 463.

¹⁵⁵ *Giannini*, *supra* note 8, at 463.

¹⁵⁶ See, e.g., *People v. Thomas*, 290 P.2d 491, 495 (Cal. 1955) ("In any event, while the requirement . . . that the question be asked is substantial and a failure to ask it is fatal to the judgment if defendant has been deprived of counsel . . . it is not fatal where defendant is present and represented by counsel and no prejudice appears."); *People v. Maese*, 164 Cal. Rptr. 485, 493 (1980) ("The so-called 'allocation' required by section 1200, however, is a formal inquiry to be addressed in terms of the statute . . . and, because it is a formality only, it need not include the details for which defendant argues here." (citation omitted)); see also *Dawson Jr.*, *supra* note 26, at 118.

¹⁵⁷ While this Note focuses on a defendant's right to allocation, this right is not exclusively defendants'. See *Campbell*, *supra* note 5, at 406 ("Where an offender's allocation right is acknowledged, it is common practice to allow the prosecution—and sometimes crime victims—a similar opportunity to address their sentencing concerns."). Great strides have been made in victim participation during sentencing. See generally *Giannini*, *supra* note 8.

¹⁵⁸ See, e.g., OR. CONST. art. 1 § 11 ("In all criminal prosecutions, the accused shall have the right to . . . be heard by himself and counsel"); R.I. CONST. art. I § 10 ("In all criminal prosecutions, accused persons . . . shall be at liberty to speak for themselves . . ."). The Supreme Court of Oregon has interpreted this provision to include a defendant's right to be heard at sentencing. See *DeAngelo v. Schiedler*, 757 P.2d 1355, 1357 (Or. 1988). The Rhode Island Supreme Court has interpreted this constitutional provision to afford defendants a right to allocation. See *Gonder v. State*, 935 A.2d 82, 89 (R.I. 2007).

¹⁵⁹ *CAMPBELL*, *supra* note 5, at 404 ("Two general issues recur . . . First, does the jurisdiction recognize allocation under its constitution, common law, statutes, or court rules? Second . . . what constitutes its satisfaction?").

¹⁶⁰ *Barnett*, *supra* note 50, § 3. Where allocation is not imposed by statute or a rule, it is still recognized. Still, "there appears to be a tendency to treat the practice as a formality or to disregard it entirely." *Id.*

For a historical survey of provisions for allocation, see *Barrett*, *supra* note 2, at 124-43. The following is a more modern survey demonstrating the prominence of statutes and rules for allocation:

Alabama: ALA. R. CRIM. P. 26.9(b)(1); *Davis v. State*, 747 So. 2d 921, 924-25 (Ala. Crim. App. 1999) (explaining that the Alabama Criminal Rule "provides that in

pronouncing the sentence, the trial judge must “[a]fford the defendant an opportunity to make a statement in his or her own behalf before imposing sentence”).

Alaska: ALASKA R. CRIM. P. 32.2(b) (“Before imposing sentence the court shall afford the defendant an opportunity to make a statement . . . and to present any information in mitigation of punishment.”).

Arizona: ARIZ. R. CRIM. P. 26.10(b)(1) (“The Court shall: (1) Give the defendant an opportunity to speak on his or her own behalf.”); *State v. Hinchey*, 890 P.2d 602, 608 (Ariz. 1995).

Arkansas: ARK. CODE ANN. § 16-90-106(b) (West 2006) (“When a defendant appears for judgment . . . [h]e . . . must be asked if he has any legal cause to show why judgment should not be pronounced . . .”).

Colorado: COLO. R. CRIM. P. 32(b)(1) (“Before imposing sentence, the court shall afford the defendant an opportunity to make a statement in his or her own behalf, and to present any information in mitigation of punishment.”); COLO. REV. STAT. § 16-11-102(5) (2008) (“[T]he court shall afford the defendant an opportunity to make a statement in his or her own behalf and to present any information in mitigation of punishment.”).

Connecticut: CONN. R. SUPER. CT. § 43-10(3) (1998) (“Before imposing a sentence . . . [t]he judicial authority shall allow the defendant a reasonable opportunity to make a personal statement in his or her own behalf and to present any information in mitigation of the sentence.”).

Delaware: DEL. R. CRIM. P. 32(a)(C) (“Before imposing sentence, the court shall . . . [a]ddress the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.”).

Florida: FLA. R. CRIM. P. 3.720(a) (“At [a sentencing] hearing: (a) The court shall inform the defendant of the finding of guilt . . . and of the judgment and ask the defendant whether there is any legal cause to show why sentence should not be pronounced. The defendant may allege and show as legal cause why sentence should not be pronounced only: (1) that the defendant is insane; (2) that the defendant has been pardoned . . . ; (3) that the defendant is not the same person against whom the verdict or finding of the court or judgment was rendered; or (4) if the defendant . . . is pregnant.”). Significantly, Florida’s provision is limited to the common law allocutions.

Georgia: GA. CODE ANN. § 17-10-2 (Lexis Nexis 2008) (“[T]he judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment.”).

Hawaii: HAW. R. PENAL P. 32(a) (“Before suspending or imposing sentence, the court shall address the defendant personally and afford a fair opportunity to the defendant and defendant’s counsel, if any, to make a statement and present any information in mitigation of punishment.”).

Indiana: IND. CODE ANN. 35-38-1-5 (West 2004) (“The defendant may also make a statement personally in the defendant’s own behalf and, before pronouncing sentence, the court shall ask the defendant whether the defendant wishes to make such a statement.”).

Iowa: IOWA R. CRIM. P. 2.23(3) (“When the defendant appears for judgment, the defendant must be . . . asked whether [he] has any legal cause to show why judgment should not be pronounced against the defendant.”). This statute sounds similar to the ancient formality of asking for a specific “legal cause” rather than allowing a defendant to present evidence in mitigation of punishment. However, the rule continues in paragraph (d) to require that that prior to the court’s rendition of judgment “counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment.” Together, these requirements comprise a defendant’s right to allocution. *State v. Nosa*, 738 N.W.2d 658, 660 (Iowa Ct. App. 2007).

Kansas: KAN. STAT. ANN. § 22-3424(e)(2) (West 1995) (“Before imposing sentence the court shall: address the defendant personally and ask the defendant if the defendant wishes to make a statement on the defendant’s own behalf and to present any evidence in mitigation of punishment.”).

Kentucky: KY. REV. STAT. ANN. § 532.025 (West 2001).

Massachusetts: MASS. R. CRIM. P. 28(b) (“Before imposing sentence the court shall afford the defendant . . . an opportunity to speak on behalf of the defendant and to present any information in mitigation of punishment.”).

Michigan: MICH. CT. R. 6.425(E)(1)(c) (“At sentencing, the court must, on the record: give the defendant . . . an opportunity to advise the court of any circumstances [he] believe[s] the court should consider in imposing sentence.”).

Minnesota: MINN. R. CRIM. P. 27.03 (before pronouncing sentence, “[t]he court shall also address the defendant personally and ask if the defendant wishes to make a statement in the defendant’s own behalf and to present any information before sentence . . .”).

Missouri: MO. R. CRIM. P. 29.07(b)(1) (“When the defendant appears for judgment and sentence, he must be informed by the court of the verdict or finding and asked whether he has any legal cause to show why judgment and sentence should not be pronounced against him[.]”); MO. ANN. STAT. § 546.570 (Vernon 2002) (“When the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he has any legal cause to show why judgment should not be pronounced against him[.]”).

Nebraska: NEB. REV. STAT. § 29-2201 (2008) (“Before the sentence is pronounced, the defendant must be informed . . . of the verdict . . . and asked whether he has anything to say why judgment should not be passed . . .”).

Nevada: NEV. REV. STAT. § 176.015(2)(b) (2001) (“Before imposing sentence, the court shall: Address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.”).

New Jersey: N.J. R. 3:21-4(b) (“Before imposing sentence the court shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The defendant may answer personally or by his attorney.”).

New York: N.Y. CRIM. PROC. LAW § 380.50(1) (“The defendant also has the right to make a statement personally in his or her own behalf, and before pronouncing sentence the court must ask the defendant whether he or she wishes to make such a statement.”).

North Carolina: N.C. GEN. STAT. ANN. § 15A-1334(b) (West 2008) (“The defendant at the [sentencing] hearing may make a statement in his own behalf.”).

Ohio: OHIO R. CRIM. P. 32(A)(1) (“At the time of imposing sentence, the court shall do all of the following . . . address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.”).

Rhode Island: R.I. R. CRIM. P. 32(a)(1) (“Before imposing sentence the court . . . shall address the defendant personally and ask the defendant if he or she wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment.”).

Tennessee: TENN. CODE ANN. § 40-35-210(b)(7) (West 2008) (“To determine the specific sentence and the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider . . . [a]ny statement the defendant wishes to make in the defendant’s own behalf about sentencing.”).

Utah: UTAH R. CRIM. P. 22(a) (“Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed.”).

Vermont: VT. R. CRIM. P. 32(a)(1)(C) (“Before imposing sentence the court shall: address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information relevant to sentencing.”).

Virginia: VA. CODE ANN. § 19.2-298 (2008) (“Before pronouncing the sentence, the court shall inquire of the accused if he desires to make a statement and if he desires to advance any reason why judgment should not be pronounced against him.”).

recognized . . . as part of the common-law practice.”¹⁶¹ However, absent a statute or court rule, there generally is no right to allocution in non-capital felony cases.¹⁶² Although some states have explicitly considered the issue of evidentiary safeguards, concluding that allocution is not to be sworn under oath or subject to cross-examination,¹⁶³ the courts’ justifications for

Washington: WASH. REV. CODE ANN. § 9.94A.500(1) (West 2008) (“Before imposing a sentence . . . [t]he court shall consider . . . and allow arguments from . . . the offender . . . as to the sentence to be imposed.”); *State v. Shackel*, No. 26828-4-III, 2009 WL 44820, at *2 (Wash. Ct. App. Jan. 8, 2009) (“[I]n order to preserve this right, a defendant must give the court some indication of his wish to plead for mercy or offer a statement in mitigation of his sentence.”).

Wisconsin: WIS. STAT. § 972.14(2) (2007) (“Before pronouncing sentence, the court shall ask the defendant why sentence should not be pronounced upon him or her and allow the district attorney, defense counsel and defendant an opportunity to make a statement with respect to any matter relevant to the sentence.”).

Wyoming: WYO. R. CRIM. P. 32(c)(1)(C) (2008) (“Before imposing sentence, the court shall . . . [a]ddress the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.”).

¹⁶¹ Barnett, *supra* note 50, § 4[b].

¹⁶² See, e.g., *Harrell v. State*, 947 So. 2d 309, 316 (Miss. 2007) (holding that “[a]llocution is not a matter of right” so defendant was not entitled to allocute, especially when he made no indication he desired to do so); see also Barnett, *supra* note 49, § 4[b].

¹⁶³ See *Biddinger v. State*, 868 N.E.2d 407, 413 (Ind. 2007); *Booth v. State*, 507 A.2d 1098, 1110 (Md. 1986), *vacated in part on other grounds by Booth v. State*, 482 U.S. 496 (1987). In *Biddinger*, the court recognized that although testimony as evidence is under oath and subject to cross-examination, “a statement in allocution is not evidence.” *Biddinger*, 868 N.E.2d at 413. Nevertheless, the Court acknowledged that the purpose of allocution is to give the defendant a chance to inform the court about facts and circumstances relevant to sentencing. *Id.* Accordingly, subjecting the statement “to the rigors of cross-examination” would undermine the underlying purpose. *Id.* (“When the defendant is given the opportunity to explain his or her views of the facts and circumstances, the purpose of the right of allocution has been accomplished. The underlying purpose of allocution is undermined when a defendant’s statement is put to the rigors of cross-examination.” (citation omitted)); see also *State v. Johnson*, 245 S.W.3d 288, 296 (Mo. Ct. App. 2008). The Missouri Court of Appeals explicitly recognized that nothing in Missouri’s statute providing for allocution required that it be under oath or subject to cross examination. *Johnson*, 245 S.W.3d at 296. Rather, the Court stated, without explanation, that “the better practice would be for the circuit court, before pronouncing sentence, to allow the defendant to speak without being under oath and subject to cross-examination.” *Id.*; accord *State v. Keathly*, 145 S.W.3d 123, 125-30 (Tenn. Crim App. 2003) (holding that a defendant was not afforded allocution when prosecution required that his statement be made under oath and then subjected it to rigorous cross-examination because the statement thus did not achieve “functional equivalency” of a statement not subject to cross-examination).

In *Booth*, the judge afforded defendant the right to allocute prior to sentencing, and said to the jury, “the defendant has the right to address you and say whatever it is he wishes to say to you concerning the matters that you are going to be deliberating on.” *Booth*, 507 A.2d at 1110. The prosecutor reminded the jury that the defendant was not under oath, nor was his statement subject to cross-examination, contrasting it with testimonial evidence. *Id.* (“[Defendant] stood here, and testified, not under oath, for one reason only, to avoid cross-examination.”). According to the

these conclusions are unsatisfactory. For example, one court recognized that allocution gives a defendant the opportunity to inform the court of facts and circumstances relevant to sentencing, but did not explain how and why the “rigors of cross-examination” would undermine that purpose.¹⁶⁴ Without better justifications, courts should reevaluate this approach in light of California’s highly justified requirements of oaths and cross-examination.

B. *California Model for the Right to Allocution*

The right to allocution in California was codified in 1850.¹⁶⁵ In *People v. Shannon B.*,¹⁶⁶ the California Court of Appeals held that the right to allocution under Penal Law section 1200¹⁶⁷ permits a defendant to make an unsworn personal statement “and present information in mitigation of punishment.”¹⁶⁸ *People v. Evans*,¹⁶⁹ however, laudably

Maryland Court of Appeals, the “obvious purpose” of allocution is to afford a defendant the opportunity to make an unsworn statement not subject to cross-examination, since it is “not testimony in the conventional sense.” *Id.* at 1111.

¹⁶⁴ *Biddinger*, 868 N.E.2d at 413.

¹⁶⁵ *People v. Shannon B.* (*In re Shannon B.*), 27 Cal. Rptr. 2d 800, 805 (Cal. Ct. App. 1994), *overturned by* *People v. Evans*, 187 P.3d 1010 (Cal. 2008).

¹⁶⁶ *In re Shannon B.*, 27 Cal. Rptr. 2d 800 (Cal. Ct. App. 1994). While acknowledging that “cause” is expressly limited to “insanity or grounds in arrest . . . of judgment . . . [,]” the Court asked, “Are these the *only* matters that may be raised in California upon allocution, or is the defendant entitled to make a personal statement in mitigation of punishment?” *Id.* at 805.

Since the provisions were “drawn almost verbatim” from New York’s Draft Code of Criminal Procedure in 1850, the Court examined the right to allocution in New York in 1850. *Id.* at 806. The Court noted that New York cases allowed a defendant to address the court in an attempt to mitigate punishment. *Id.* at 805. (“In other cases, when sentence is about to be passed, the defendant may address the court in mitigation of punishment, as well as in arrest of judgment, whether he was tried and convicted or pleaded guilty . . .”). Ultimately, the Court held that California’s statutory right to allocution must also encompass a more expansive concept of allocution—that is, one that allows defendants the opportunity to give a personal statement and present information in mitigation of punishment—simply because it was based on New York’s Draft Code. *Id.* at 807.

¹⁶⁷ Penal Law § 1200 provides:

When the defendant appears for judgment he must be informed by the court, or by the clerk, under its direction, of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him.

CAL. PENAL CODE § 1200 (West 2004); *In re Shannon B.*, 27 Cal. Rptr. 2d at 805.

¹⁶⁸ *In re Shannon B.*, 27 Cal. Rptr. 2d at 807.

¹⁶⁹ *Evans* was convicted of receiving stolen property. *Evans*, 187 P.3d at 1012. *Evans* had five prior felonies, in addition to a “serious or violent felony” which constituted a “strike.” *Id.* at 1012-13. At sentencing, the trial court asked “whether

overturned *Shannon B*, no longer permitting an unsworn personal statement.¹⁷⁰ The California Supreme Court noted that Penal Law section 1200 restricts a defendant's allocutions to specified "causes against the judgment" in Penal Law section 1201,¹⁷¹ rejecting *Shannon B*'s expansive approach.¹⁷² According to the state Supreme Court, when a defendant gives an unsworn statement to mitigate punishment, she does not give the court "reasons *not to pronounce judgment*; rather, [she gives] reasons why the court should *pronounce a more lenient sentence*,"¹⁷³ which is not the same right as provided in Penal Law section 1200.

Nevertheless, the Court explained that the right to present information to mitigate punishment—albeit, not in the form of an unsworn statement—still exists in California.¹⁷⁴ In doing so, the Court referred to Penal Law section 1204,¹⁷⁵ which

there was 'any legal cause why sentence cannot now be pronounced.'" *Id.* at 1013. Counsel responded by asserting that there was "[n]o legal cause." *Id.* Counsel also explained that the defendant's conduct was attributable to his drug addiction and pleaded for the trial court to "give defendant 'one more chance' by placing him on probation and ordering placement at a residential drug treatment program." *Id.* The defendant asked to speak, and the trial court denied his request. *Id.* The defendant argued that the denial violated his right to make a personal statement and present information in mitigation of punishment. *Id.*

¹⁷⁰ See *id.* at 1016; *In re Shannon B.*, 27 Cal. Rptr. 2d at 807.

¹⁷¹ *Evans*, 187 P.3d at 1013. These "cause[s] against the judgment" include "that the defendant is insane, that the trial court should grant a motion in arrest of judgment, or that the court should order a new trial." *Id.* Implicit in this holding was that defendant was not allowed to present any other information beyond those stated reasons, or make any personal statement in mitigation of punishment. Nevertheless, the court acknowledged that by the 19th century, criminal procedure had changed so that defendants had the right to testify and right to counsel, and the Court, quoting from a British treatise, explained that if a defendant "has nothing to urge in bar, he frequently addresses the court in mitigation of his conduct . . . or casts himself upon their mercy." *Id.* at 1014-15 (citation omitted). Another American treatise reiterated the same idea that "[i]n other [noncapital] cases, when sentence is about to be passed, the defendant may address the court in mitigation of punishment . . ." *Id.* at 1015 (citation omitted).

¹⁷² *Id.*

¹⁷³ *Id.* Consequently, the Court concluded, "Irrespective of whether the common law right of allocution included a right to make a statement in mitigation, [section 1200] address[es] quite a different matter—whether legal cause to pronounce judgment does or does not exist; i.e., whether there is some infirmity that makes pronouncement of judgment improper." *Id.*

¹⁷⁴ *Id.* at 1016.

¹⁷⁵ California Penal Law § 1204 provides:

The circumstances [in aggravation or mitigation of punishment] shall be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court . . . in aggravation

provides that a witness can testify to aggravating or mitigating circumstances related to punishment¹⁷⁶ and, by extension, a defendant could call herself as a witness for this purpose.¹⁷⁷ However, the Court equated such allocution testimony with traditional evidence,¹⁷⁸ which is sworn under oath and subject to cross-examination.¹⁷⁹

The California Supreme Court set a notable precedent for the right to allocution by requiring that a defendant's testimony be sworn under oath and subject to cross-examination.¹⁸⁰ In light of the current shortcomings of allocution, California's more structured and accountable approach should be adopted for reasons beyond the statutory arguments.¹⁸¹ Specifically, as in *Evans*, legislatures and courts should uniformly redefine the right to allocution's procedures to include taking oaths and performing cross-examination.

or mitigation of the punishment, except as provided in this and the preceding section.

CAL. PENAL CODE § 1204 (West 2004).

¹⁷⁶ *Evans*, 187 P.3d at 1016.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* The defendant in *Evans* countered by asserting that limits to his ability to freely present information "would burden non-capital cases with an added penalty-phase-like trial." *Id.* However, the Court found this argument unconvincing since California Court Rule 4.411.5(a)(4) allows the trial court to limit the evidence received to only matters related to sentencing. *Id.* The defendant also asserted constitutional infirmities of such an approach by mentioning the Fifth, Sixth and Fourteenth Amendments. *Id.* at 1017. However, "he d[id] not explain why the Fifth or Sixth Amendments might be pertinent to his claim, and focuse[d] instead on the Fourteenth Amendment's right to due process of law." *Id.* Nevertheless, according to the court, due process mandates that the defendant be heard "at a meaningful time and in a meaningful manner[.]" and requiring that a personal statement be sworn and subject to cross-examination does not impinge upon that right. *Id.*

¹⁷⁹ To further efficiency, if both parties consent, lower courts might allow a defendant to urge lesser punishment with an unsworn statement not subject to cross-examination. *Id.* at 1016-17 ("[A] trial court that prefers to proceed more informally may, with the parties' consent, choose not to have the defendant testify under oath and instead allow the defendant to make a brief unsworn statement urging lesser punishment."). Moreover, the Court indicated that policy or social justifications for formally requiring oaths and cross-examination should be left to the Legislature. *Id.* at 1017.

¹⁸⁰ See *id.* at 1016; see also Bob Egelko, *Court Limits Defendant's Right to Seek Mercy*, S.F. CHRON., Jul. 25, 2008, at B-2, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/25/BA5511V00L.DTL>.

¹⁸¹ See *supra* Part I.B.1.a & I.B.2.a.

III. ADVANTAGES OF EVIDENTIARY REFORM TO THE RIGHT TO ALLOCUTION

As illustrated, the right to allocution cannot and should not continue to exist in its present form. Despite its shortcomings, however,¹⁸² allocution still has the potential to benefit both defendants and sentencing proceedings.¹⁸³ Indeed, its effectiveness *must* be enhanced,¹⁸⁴ since the Supreme Court has recognized that no one can speak adequately for a defendant,¹⁸⁵ and other federal courts have urged that allocution become “a vital and integral part of the sentencing process.”¹⁸⁶ This Part argues that to realize allocution’s benefits and to make the process “vital and integral” to punishment, state legislatures¹⁸⁷ must mandate evidentiary safeguards in order to decrease inaccuracies and alleviate injustices of the “unfettered discretion” that plague allocution, and sentencing by extension.¹⁸⁸ Toward this end, instead of casting allocution aside,¹⁸⁹ states should improve the right¹⁹⁰ with traditional

¹⁸² See *supra* Part I.A-B.

¹⁸³ See, e.g., *United States v. Haygood*, 549 F.3d 1049, 1055 (6th Cir. 2008) (“Where the defendant ‘did not receive the shortest sentence allowed by statute,’ there is at least some possibility that ‘allocution could have had an effect on [the] sentence[]’”); see also *Marshall*, *supra* note 5, at 220 (“The fact that under modern practice all felons have a right to counsel who should know when to speak for them is no reason for denying allocution [Court appointed] attorneys often have to hurry the case to keep up with other tasks and thus may not be as familiar with the facts as the defendant himself.” (citation omitted)).

¹⁸⁴ See, e.g., *United States v. Carter*, 355 F.3d 920, 926 (6th Cir. 2004) (“Addressing the evidence to show a mitigating role is particularly apt if a plea was not entered explaining a defendant’s conduct and/or mental state, or if the defendant did not testify during trial.”); *Boardman v. Estelle*, 957 F.2d 1523, 1526 (9th Cir. 1992) (“In the context of criminal law, the backbone of [our] democratic faith is the right of a criminal defendant to defend himself against his accusers; and it has long been recognized that allocution, the right of the defendant to personally address the court, is an essential element of a criminal defense.”); see also *Green v. United States*, 365 U.S. 301, 304 (1961) (recognizing that lawyers cannot allocute with the same effect a defendant may be able to on his own behalf); *Booth v. State*, 507 A.2d 1098, 1110 (Md. 1986) (“[Defendant], who had elected not to testify at the guilt or innocence phase, opened his statement to the jury by saying that ‘I finally get a chance to say something to you.’”).

¹⁸⁵ See *supra* note 150 and accompanying text.

¹⁸⁶ *Giannini*, *supra* note 8, at 463.

¹⁸⁷ *Kennedy*, *supra* note 24, at viii (“The sad fact is that our judges act without any guidelines or review because Congress and state legislatures have not built any standards or safeguards into the sentencing process.”).

¹⁸⁸ *Id.* at viii; see also *supra* Part I.B.1-2.

¹⁸⁹ Indeed, scholars have suggested discarding allocution completely. Jonathan Scofield Marshall concluded that:

Allocution had a rational function at one point in history, but . . . [i]t is revolting to have no better reason for a rule of law than that so it was laid

evidentiary safeguards by adopting the California model. This Part argues that this California approach will realign allocation with the adversarial system, and refocus the attention on evaluating facts and credibility.¹⁹¹ The California method will also help realize allocation's fundamental aims of promoting sentencing accuracy and enhancing sentencing equity. Finally, in realizing these goals, the quantitative and qualitative efficiency of sentencing will also be improved.

A. *Realigning the Right to Allocution with the Adversarial System*

Currently, allocation is often overlooked¹⁹² in the sentencing phase because it does not fall in line with a criminal proceeding's adversarial nature.¹⁹³ A statement during allocation is not subject to the truth-testing mechanisms of oaths and cross-examination, and thus, is inherently suspect.¹⁹⁴ Indeed, judges have imposed sentences before remembering to grant the right to allocute.¹⁹⁵ This cavalier attitude should be

down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Marshall, *supra* note 5, at 223 (internal citations omitted).

¹⁹⁰ Green v. United States, 365 U.S. 301, 304 (1961) ("There was no reason why a procedural rule should be limited to the circumstances under which it arose, if reasons for the right . . . remained, and that none of the modern innovations in criminal procedure lessened the need for the defendant . . . to speak have the opportunity to present to the court his plea in mitigation . . .").

¹⁹¹ See ABA STANDARDS, *supra* note 66, at 189 (proposing that with respect to pre-sentence reports, "[a] procedural system must address the possibility that information included in, or omitted . . . will be a matter of controversy between the defense and prosecution).

¹⁹² See *supra* note 8 and accompanying text.

¹⁹³ Mueller, *supra* note 20, at 11 ("The loss of rights issue for convicts finds its very first reflection in the procedural rules which govern the sentencing segment of the trial phase. The constitutionally dictated trial rules and safeguards and, thus, the formalities, are reduced to a minimum.").

¹⁹⁴ *Id.* at 12 ("The procedural safeguards and the rules of evidence which . . . do not apply during the second stage[,] . . . demonstrate[] the dangers inherent in the second stage.").

¹⁹⁵ See, e.g., United States v. Lopez-Lopez, 295 F.3d 165, 171 (1st Cir. 2002) (defendant appealed, in part, because "the district court erred when it announced its sentencing findings before giving him an opportunity for allocution.") (citation omitted). In states where allocation is not imposed by a statute or a rule, it is technically still recognized, but "there appears to be a tendency to treat the practice as a formality or to disregard it entirely." See United States v. Scallion, 533 F.2d 903, 920 n.20 (5th Cir. 1976) (where the court acknowledged that defendant himself had not given a personal statement in mitigation of punishment, but nevertheless found no violation of Rule 32 because his counsel had given a statement).

rejected through evidentiary changes to allocution by mandating oaths and cross-examination.

Traditional evidentiary mechanisms will enhance allocution's importance because most believe that these protections are the best tools for separating fact from fiction in court.¹⁹⁶ Indeed, in an adversarial trial, rules of evidence filter testimony and "facilitate [a] . . . quest for the truth."¹⁹⁷ To focus on verifiable facts, credibility is a necessary consideration¹⁹⁸ that is effectively brought to light through cross-examination.¹⁹⁹ According to *Evans*, an allocutory statement is "testimony" given by "witnesses," one of whom can be the defendant.²⁰⁰ Consequently, allocution is analogous to "evidence,"²⁰¹ which is subject to the rigors of evidentiary rules.²⁰² Therefore, testimony during allocution must be subject to similar evidentiary rigors of oaths and cross-examination.

Treating allocution testimony as evidence and subjecting it to traditional evidentiary standards²⁰³ will realign the right with our adversarial system and facilitate the necessary focus on eliciting the truth or falsity of a statement.

¹⁹⁶ See, e.g., *State v. Lord*, 822 P.2d 177, 213 (Wash. 1991) ("The use of the rules of evidence . . . serves to enhance the truth-finding process which is the touchstone of criminal law."); see also GREG BERMAN & JOHN FLEINBATT WITH SARAH GLAZER, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 17 (2005) (belief in the adversarial system as the best way to ascertain truth "is deeply embedded in the American legal system"); D'ALESSIO & STOLZENBERG, *supra* note 3, at 237.

¹⁹⁷ Saul M. Kassir, *The American Jury: Handicapped in the Pursuit of Justice*, in *CRIMINAL COURTS FOR THE 21ST CENTURY* 265 (Lisa Stolzenberg & Stewart J. D'Alessio eds., 1999).

¹⁹⁸ See Sullivan, *supra* note 57, at 66 ("No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing they would wish to know.") (quoting *State v. Duke*, 123 A.2d 745, 746 (N.H. 1956)).

¹⁹⁹ If a witness is not telling the truth, cross-examination is intended to "destroy that which is false." Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563, 566 (1996) (quoting FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* (4th ed. 1936)). Moreover, if a witness is exaggerating, distorting, or creating a wrong sense of proportion, cross-examination should "whittle down the story to its proper size and its proper relation to other facts." *Id.*

²⁰⁰ *People v. Evans*, 187 P.3d 1010, 1016 (Cal. 2008).

²⁰¹ *Id.*

²⁰² HAZEL B. KERPER & JEROLD H. ISRAEL, *INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM* 318 (2d ed. 1979) ("The rules [of evidence] are designed to serve several functions, but their primary objective is to help the fact-finder in reaching an accurate verdict based upon reliable information.").

²⁰³ See *Evans*, 187 P.3d at 1016 (explaining that by stating in section 1204 that mitigating evidence must be presented through "the testimony of witnesses examined in open court" rather than verbal representations, the Legislature has declared that a criminal defendant wishing to make an oral statement to the court in mitigation of punishment must do so through testimony given under oath).

Specifically, cross-examination aims to enhance the credibility of deserving witnesses, while diminishing the credibility of unreliable ones.²⁰⁴ Therefore, cross-examination will enhance the trustworthiness of the allocution process, and facilitate the judge's ability to focus on verifiable truths.²⁰⁵ This confidence will enhance allocution's importance by ensuring that reliable information is available for the judge to use in determining a fair and accurate sentence.

Equating allocution with testimonial evidence and realigning the process with the adversarial system is necessary because allocution plays a vital role in the "truth-discovery" process of sentencing.²⁰⁶ During allocution, a judge must rely on information to impose an appropriate punishment. Since the right to cross-examine is guaranteed at trial,²⁰⁷ a defendant's allocution should not be exempt from these same determinations. Indeed, through cross-examination, defendants should have an opportunity to verify their statements and be rewarded for their credibility by having their words taken seriously. In this vein, the proposed evidentiary safeguards should enhance the credibility of a defendant's statement, while diminishing judges' tendencies to favor irrelevant and subjective considerations.²⁰⁸ In turn, these evidentiary

²⁰⁴ Kassin, *supra* note 197, at 265 ("In theory, direct and cross-examination should thus enhance the credibility of witnesses who are accurate and honest, while diminishing the credibility of those who are inaccurate or dishonest—in other words, it should heighten the jury's factfinding competence.").

²⁰⁵ "Cross-examination has been called the greatest legal engine ever invented for the discovery of the truth." Peter M. Burke & Gianfranco A. Pietrafesa, *An Introduction to Cross-Examination*, N.J. LAW., Dec. 1998, at 28. To illustrate the purpose of cross-examinations, the authors pose the following questions, among others:

Can you discredit the testimony given on direct examination? In other words, can you demonstrate inconsistencies in the testimony given on direct examination? Can you demonstrate that the testimony given on direct examination conflicts with the testimony of other witnesses? . . . Can the cross-examination be used to enhance or destroy the credibility of other witnesses?

Id.; see also Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1027 (2003) (explaining that cross-examination provides an attorney with an "arsenal of weapons to probe the credibility of the witness and the believability of the testimony provided by the witness").

²⁰⁶ Brief of Petitioner-Appellant at 4, *State v. Petit*, 648 N.W.2d 193 (Mich. 2002) (No. 119348); see also *supra* Part I.B.1.

²⁰⁷ *Mueller*, *supra* note 20, at 11; see also *Alford v. United States*, 282 U.S. 687 (1930) (noting that cross-examination is one of the safeguards of the law to accuracy and truthfulness); 81 AM. JUR. 2D *Witnesses* § 510 (2008) ("[C]ross-examination is the highest and most indispensable test known to the law for the discovery of truth.").

²⁰⁸ See *supra* Part I.B.2.a.

safeguards will reform the right to allocution from the current “nonsystem”²⁰⁹ that it is to the more structured adversarial process it needs to be. In addition, evidentiary safeguards will encourage a defendant to assert only information that she deems well-founded enough to withstand cross-examination.²¹⁰ In sum, with oaths and cross-examination, allocution will command a greater importance and play a more meaningful role in sentencing proceedings.

B. Furthering Allocution’s Goals and Enhancing Sentencing Efficiency

By enhancing the importance of allocution with oaths and cross-examination, allocution’s aims of promoting accuracy and enhancing perceived equity will also be realized. Ultimately, furthering these goals will increase the overall efficiency of criminal proceedings. With the high stakes at sentencing, there is certainly an argument to be made for traditional evidentiary standards during allocution²¹¹ to ensure that the information presented is limited to that which can withstand rigorous evidentiary challenge.²¹² Such limitations will also reject subjective impressions as measures of an appropriate sentence.²¹³ This Part argues that limiting the information presented during allocution is imperative to realizing allocution’s aims of promoting sentencing accuracy and enhancing the perceived equity of the sentencing process.²¹⁴

²⁰⁹ CHURGIN ET AL., *supra* note 24, at 3. Sentencing judges cannot perform their function of specifying “unique facts” relied upon during sentencing. See ABA STANDARDS *supra* note 66, at 225.

²¹⁰ Reliable information is especially crucial in the sentencing phase because, while judges have wide latitude in imposing a sentence, one of the few restraints upon their discretion is that they not rely on false information. CAMPBELL, *supra* note 5, at 371 (“Valid sentences cannot rest on false information. This is the clearest stricture on what is otherwise regarded as a judge’s virtually unlimited discretion to consider sentencing data. Stated another way . . . offenders have the right not to be sentenced on invalid facts.”).

²¹¹ See Harvard Law Review Association, *supra* note 9, at 825. Indeed, “the results of the present ‘administrative’ system are generally admitted to be unsatisfactory . . .” *Id.*

²¹² Accordingly, information during sentencing should be limited only to “material facts which . . . if challenged, can be substantiated.” ABA STANDARDS, *supra* note 66, at 179.

²¹³ *Id.* at 180 (stating that a limitation to material facts that can be substantiated rejects gossip, subjective impressions, and unreliable and unknown source reports).

²¹⁴ See *State v. Wanosik*, 79 P.3d 937, 943 (Utah 2003) (explaining that while allocution offers defendants a personal opportunity to speak, judges should also be provided with “reasonable reliable and relevant information”).

1. Promoting Sentencing Accuracy and Increasing Quantitative Sentencing Efficiency

The legitimacy of a sentencing decision rests on the quality of information provided.²¹⁵ Traditional evidentiary safeguards will necessarily promote fuller and more accurate disclosure, thereby ensuring that the “adversarial truth” is not stifled during allocution.²¹⁶ When the “adversarial truth” is maximized, sentencing errors will decrease and the chances that any remaining errors will be discovered upon review will increase. Both scenarios promote sentencing accuracy²¹⁷ and ultimately increase the overall quantitative efficiency of sentencing.

Mandating evidentiary safeguards during allocution will enhance the credibility of testimony, facilitate more accurate punishments, and relieve society of the enormous burden of inaccurate sentences.²¹⁸ In addition, evidentiary safeguards will diminish the costs of sentencing errors²¹⁹ because the rigors of

²¹⁵ CHURGIN ET AL., *supra* note 24, at 51; *see also* ABA STANDARDS, *supra* note 66, at 175 (“[R]ational and consistent sentencing decisions can be achieved only if sentencing courts have reliable information that contains an accurate and relatively uniform body of facts about all offenders. Good sentencing decisions depend upon good information.”).

²¹⁶ CAMPBELL, *supra* note 5, at 369 (citing *State v. Carson*, 597 P.2d 862, 866 (Utah 1979) (“Given the volume of cases handled by the courts, sentencing may be based on errors which, if made known to the trial judge, could produce a different result. To avoid errors, sentencing procedures require a somewhat stricter standard than the general presumption of regularity. At the least, there should be on the record an identification of the reports that were before the sentencing judge at the time of pronouncing sentence and an indication that those reports were made with respect to the particular person to be sentenced.”)).

²¹⁷ *See* CAMPBELL, *supra* note 5, at 369. Judges also have a tendency to give little weight to this information, rendering the time and energy spent on allocution a waste. *See United States v. Quintana*, 300 F.3d 1227, 1231 (11th Cir. 2002) (noting situations where statements have little chance of influencing, so are merely of “symbolic significance” and not practical significance).

²¹⁸ “The cost of housing, feeding and caring for the inmate population in the United States is over 40 billion dollars per year . . . [a]nd despite the high expenditures in prison, there remain urgent unmet needs in the prison system.” AMERICAN BAR ASSOCIATION, *supra* note 8, at 2; *see also* BERMAN & FEINBLATT WITH GLAZER, *supra* note 196, at 20 (noting that America’s inmate population had grown from 500,000 in 1980 to two million in 2001, and prison spending had risen from \$7 billion to \$45 billion).

²¹⁹ Kennedy, *supra* note 24, at vii (noting that “[t]he real issue [in sentencing reform] is determining—with some degree of fairness and uniformity—which offender belongs in prison and which does not” and by extension, for those who do belong in prison, for how long). The pre-sentence report is another avenue through which information is gathered, and which judges rely on, and scholars have argued for more stringent procedures in this regard as well. *See* CHURGIN ET AL., *supra* note 24, at 52 (arguing for more detailed procedures in preparing the pre-sentence report to correct any factual errors and have the information play a meaningful role at sentencing).

the process will ensure that sentencing information is credible and complete, increasing the likelihood that judges will mitigate punishment accurately and sentence efficiently. Alternatively, if judges rely on unreliable or subjective criteria, they may impose unnecessarily long or short sentences.²²⁰ With appropriate evidentiary safeguards, however, judges will be able to accurately design a punishment to effectively impact the defendant and society.²²¹

Moreover, with these evidentiary safeguards, the review of whether a defendant was actually afforded her right to allocution will be less frequently tainted with uncertainty.²²² Currently, while reviewing courts may look to a record to determine whether allocution actually took place, the record is often unclear, incomplete, or inconclusive.²²³ Indeed, Rule 32 “does not purport to set out a script that the district courts must follow when advising defendants of their right to allocution.”²²⁴ This lack of clarity forces reviewing courts to play a guessing game with a defendant’s rights; such a cursory

²²⁰ See AMERICAN BAR ASSOCIATION, *supra* note 8, at 3 (“When it costs so much more to incarcerate a prisoner than to educate a child, we should take special care to ensure that we are not incarcerating too many persons for too long.”). When sentences are too short, the societal and fiscal costs of releasing un-rehabilitated persons are also great. U.S. Dept. of Justice, Bureau of Justice Statistics, Re-entry Trends in the U.S.—Recidivism, <http://www.ojp.usdoj.gov/bjs/reentry/recidivism.htm> (last visited July 30, 2009) (“67.5% of prisoners released in 1994 were rearrested within 3 years, an increase over the 62.5% found for those released in 1983.”).

²²¹ Mueller, *supra* note 20, at 104.

²²² In the past, there has been, and there is currently still, much litigation concerning allocution and whether it was actually afforded. See *United States v. Thomas*, 202 F. App’x 531, 533-34 (2d Cir. 2006); *United States v. Burgos-Andujar*, 275 F.3d 23, 29-31 (1st Cir. 2001); *United States v. O’Connell*, 252 F.3d 524, 527 (1st Cir. 2001); *Padilla Palacios v. United States*, 932 F.2d 31, 36 (1st Cir. 1991); see also *supra* notes 94-101 and accompanying text.

A popular source of dispute concerns the very issue addressed in the Supreme Court’s seminal decision in *Green v. United States*, which is whether the right to allocution was afforded to the defendant or the defendant’s counsel. See 365 U.S. 301, 303 (1961); see also *United States v. Muhammad*, 478 F.3d 247, 248-51 (4th Cir. 2007); *United States v. Adams*, 252 F.3d 276, 279-80 (3d Cir. 2001); *United States v. Dickson*, 712 F.2d 952, 955-56 (5th Cir. 1983) (“The point of allocution is to allow a criminal defendant the opportunity to speak for himself, rather than through the mouth of counsel.”); *Pilkington v. State*, No. A09A0782, 2009 WL 1636592, *4 (Ga. Ct. App. June 12, 2009) (holding that where counsel argued on behalf of the defendant and presented mitigating evidence, the defendant’s right to allocution was met).

²²³ See, e.g., *United States v. Magwood*, 445 F.3d 826, 828-29 (5th Cir. 2006); *United States v. Williams*, 258 F.3d 669, 674-75 (7th Cir. 2001) (“Although it never hurts to follow the language of the rule more closely, and can even help to avert arguments like this one on appeal, we conclude that no specific formula of words is required to satisfy Rule 32. The record as a whole here shows that the court satisfied its obligation and that Williams’s right to allocution was not denied.”).

²²⁴ *Williams*, 258 F.3d at 674.

approach fails to comport with the federal courts' goal of uniformity in allocution²²⁵ as well as allocution's goal of promoting sentencing accuracy. The proposed evidentiary safeguards will prevent such an offhand approach. If the evidentiary safeguards appear to have taken place on the record, there will be less doubt over whether allocution was actually satisfied. In turn, this candor will facilitate a more efficient review of sentences, and result in more accurately mitigated sentences.²²⁶

Equally significant, with allocution testimony under oath and subject to cross-examination, it is more likely that a judge will receive a full and complete picture of the individual.²²⁷ Therefore, sentences will be more accurately individualized as well. Through cross-examination, undisclosed facts will be discovered, inaccuracies will be exposed,²²⁸ and judges will have a better picture on which to base sentences. In sum, with oaths and cross-examination, sentences will be properly mitigated and individualized—as well as reviewed—thereby promoting accuracy and enhancing the quantitative efficiency of the system.

2. Enhancing Perceived Equity and Increasing Qualitative Sentencing Efficiency

In addition to promoting accuracy and quantitative efficiency, evidentiary safeguards can enhance the “perceived

²²⁵ Expressing the view that allocution is important, federal courts have stated that it should take place with absolute certainty. *See* *United States v. Quintana*, 300 F.3d 1227, 1231 (11th Cir. 2002) (“The district court must clearly inform the defendant of his allocution rights, leaving no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing.” (quoting *United States v. Gerrow*, 232 F.3d 831, 833 (11th Cir. 2000) (per curiam))).

²²⁶ *CHURGIN ET AL.*, *supra* note 24, at 60-61. Appellate courts, too, will have a clearer record on which to review only meritorious appeals. As a corollary, frivolous appeals can be weeded out because the sentencing process will be founded on more concrete procedures eliciting more verifiable information. *Id.* at 60. Addressing the argument that there will be added work load, the authors find it “unfounded” because the number of frivolous appeals will decrease when sentencing review is better facilitated. Specifically “frivolous appeals will be easily reviewed . . . since the appellate court will have before it the reasons for which the sentence was imposed in light of clearly defined statutory criteria and . . . guidelines . . .” *Id.* at 60-61.

²²⁷ Witnesses who testify prior to cross-examination leave out facts for two reasons: a witness may be biased and reluctant to disclose unfavorable facts and no witness wants to facilitate his own impeachment. Jeffrey A. Boyll, *Witness Explanations During Cross-Examination: A Rule of Evidence Examined*, 58 *IND. L.J.* 361, 366-67 (1983).

²²⁸ *See id.* at 367 (“[T]he adversary system developed cross-examination to . . . develop . . . hidden facts . . .”).

equity” and qualitative efficiency of sentencing proceedings.²²⁹ Included in this broader, more subjective notion of efficiency is “avoid[ing] the appearance of [a court] dispensing assembly-line justice”²³⁰ during sentencing, or worse yet, no justice at all.

With traditional truth-finding mechanisms, sentencing bodies will be compelled to evaluate a defendant’s credibility during allocution, and to sentence based on verifiable facts and circumstances.²³¹ Judges will no longer be able to justify rejecting a defendant’s allocution testimony in favor of subjective biases and prejudices.²³² Rather, in their quest for the truth,²³³ judges can focus on substantiated and legitimate facts because of the evidentiary safeguards. Gradually, judges will become more comfortable acting within the bounds of established evidentiary parameters, which will also promote sounder sentencing decisions.²³⁴ This sound and open decision-making process, during which a defendant’s words are given due consideration, will provide a more meaningful platform for defendants to plead for mercy and liberty. Ensuring defendants this opportunity will, in turn, enhance the qualitative efficiency of the sentencing process by effectively ensuring a defendant the right to participate in her criminal proceeding, while instilling trust in society that justice is being served.

Finally, to keep both quantitative and qualitative efficiencies in check, jurisdictions should also adopt a qualified approach to evidentiary safeguards during allocution as opposed to California’s blanket sweep.²³⁵ As noted, the process of cross-examination is intended to determine the accuracy of a

²²⁹ The argument advanced against adversarial sentencing hearings is the increased administrative inconvenience and burden on the court system. MUELLER, *supra* note 20, at 13. This view ignores broader notions of efficiency.

²³⁰ *United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991) (“In an age of staggering crime rates and an overburdened justice system, courts must continue to be cautious to avoid the appearance of dispensing assembly-line justice.”).

²³¹ *See supra* Part III.B.1.

²³² *See supra* notes 121-125 and accompanying text.

²³³ *See supra* notes 196-199 and accompanying text.

²³⁴ Pinkle, *supra* note 135, at 60-61 (“The first notion is to establish parameters for sentencing in similar situations . . . [and then] there is real possibility of canceling the sort of parochial pressures that have led repeatedly to some of the most flagrant violations of justice.”).

²³⁵ Since the Court was interpreting the state’s statutory provision, it was in no position to determine the specific scope of requiring oaths and cross-examination. Rather, the Court explicitly left it up to the Legislature to determine as “a matter of policy” whether a “defendant’s personal mitigating statement at sentencing should be made under oath and subject to cross-examination by the prosecutor[.]” *People v. Evans*, 187 P.3d 1010, 1017 (2008).

statement and the credibility of a witness.²³⁶ Accordingly, it would be superfluous and unfair to subject testimony to cross-examination when the defendant merely allocutes as to mercy, remorse, or an interest in remaining alive. Indeed, in capital sentencing, where oaths and cross-examination are usually required, courts dispense with these procedures when a defendant asserts no concrete facts.²³⁷ In these cases, cross-examination would not reveal factual inconsistencies that shed light on credibility.²³⁸ Moreover, it would be unfair for a defendant to have to *concretely prove* remorse, or her interest in remaining alive. Thus, the costs spent on cross-examination, and the unfairness of placing a defendant in the impossible position of trying to prove such intangible assertions would not exceed the intended benefits of the safeguard.²³⁹

CONCLUSION

While allocution permits a defendant to lay herself at the mercy of a sentencing body,²⁴⁰ the law cannot require that

²³⁶ See Christopher B. Mueller, *Cross-Examination Earlier or Later: When is it Enough to Satisfy Crawford?*, 19 REGENT U. L. REV. 319, 321 (2007) (“In Wigmore’s much-quoted phrase, cross-examination is ‘the greatest legal engine ever invented for the discovery of truth[.]’” (quoting John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW 1367 (James H. Chadbourn ed., rev. ed 1974))); Chase, *supra* note 205, at 1027 (explaining that cross-examination may force a witness to contradict her direct testimony, and provides “an arsenal of weapons to probe the credibility of the witness and the believability of the testimony provided by the witness”); see also *supra* notes 204-205 and accompanying text.

²³⁷ See, e.g., *State v. Zola*, 548 A.2d 1022, 1046 (N.J. 1988), *superseded by statute on other grounds as stated in State v. Delibero*, 692 A.2d 981, 987 (N.J. 1996).

[W]e shall permit the narrowly-defined right of a capital defendant to make a brief unsworn statement in mitigation [B]efore a defendant speaks, he shall be instructed . . . of the limited scope of the right; that . . . should the statement go beyond the boundaries permitted he will be subject to corrective action . . . including . . . reopening of the case for cross-examination.

Id. at 1046; see also Sullivan, *supra* note 57, at 67 (arguing that when capital defendants assert facts at issue, impeachment may remain valid, whereas when a defendant merely declares an “interest in remaining alive or avoiding the death penalty, the plea does not warrant impeachment”).

²³⁸ Indeed, “the general rule should always be ‘If there is nothing to gain, do not cross-examine.’” Paul L. Stritmatter, *The Psychology of Cross-Examination*, in 1 ASSOCIATION OF TRIAL LAWYERS OF AMERICA ANNUAL CONVENTION REFERENCE MATERIALS 3 (2006).

²³⁹ ABA STANDARDS, *supra* note 66, at 178 (arguing that with respect to pre-sentence reports, “for certain categories of offenses and offenders or of sentences, the costs of conducting investigations and preparing reports may exceed the benefits of the information to the sentencing process”).

²⁴⁰ See *United States v. Quintana*, 300 F.3d 1227, 1231 (11th Cir. 2002) (“The ability to speak directly to the sentencing judge ‘gives the defendant one more

she subject herself wholly to unchecked judicial discretion. Rather, she should be able to prove that her plea for life and liberty is worthy of substantiated and objective consideration. Currently, a defendant is given no such opportunity because evidentiary safeguards are glaringly absent, and as such, there is no assurance of credibility and trustworthiness during allocution. Accordingly, allocution does not achieve its fundamental goals of promoting sentencing accuracy and enhancing the perceived equity of sentencing proceedings.²⁴¹

This Note's proposal dictates an evidentiary standard²⁴² for but one aspect of sentencing: allocution. My hope is that this proposal will increase allocution's importance in the courts and among the legal community,²⁴³ as well as initiate further discourse to address other issues of unchecked judicial discretion in the sentencing process.²⁴⁴ Absent further reform,²⁴⁵ the most "flagrant violations of justice"²⁴⁶ will unjustifiably persist.²⁴⁷ Indeed, at the moment, while it is certain that judges base sentencing decisions primarily on subjective assessments of "harm and blameworthiness and predictions of dangerousness[,] . . . we don't know with certainty how these assessments and predictions are made."²⁴⁸ But, should we not know how judges determine the extent to which a person is deserving of life and liberty? With the stakes at sentencing so high, demanding the truth should not be too much to ask.

In the meantime, absent evidentiary safeguards to test for credibility, defendants continue to bear the brunt of

opportunity . . . to throw himself on the mercy of the court." (quoting *United States v. Dabeit*, 231 F.3d 979, 981 (5th Cir. 2000)); see also Thomas, *supra* note 8, at 2659 (recognizing that many defendants have "little to offer as an excuse for their conduct," so they simply beg for "mercy" during allocution).

²⁴¹ See *supra* Part I.B.1.a & 1.B.2.a.

²⁴² See *supra* Part III.

²⁴³ See *supra* Part III.A.

²⁴⁴ Indeed, the entire sentencing process requires reform. The debate "has focused primarily on two interrelated problems—the total absence of any prescribed guidelines to aid judges during the sentencing process and the wide disparity in the sentences actually imposed in criminal cases." Kennedy, *supra* note 24, at vii-viii.

²⁴⁵ Pinkele, *supra* note 135, at 60 (noting that parameters for sentencing should be implemented on a nationwide basis because "[t]here is no legitimate room for the sort of random, unrelated patchwork picture that today characterizes the state-by-state (sometimes even within state) patterns of sentencing practices. The only jurisdictional boundary that makes any sense at all is that of the nation-state . . .").

²⁴⁶ Pinkele, *supra* note 135, at 61.

²⁴⁷ See *supra* Part I.B.2.a.

²⁴⁸ SPOHN, *supra* note 10, at 120.

allocation's failures.²⁴⁹ Judges are forced to focus not on mitigating and individualizing facts,²⁵⁰ but rather on subjective interpretations of demeanor and remorse, thereby negating any semblance of accuracy or perceived equity in sentencing proceedings.²⁵¹ Therefore, the accuracy and equity aims of allocution will remain elusive until evidentiary mechanisms are in place to ensure that judges are inclined to rely on verifiable information during allocution.

Celine Chan[†]

²⁴⁹ See, e.g., *United States v. Li*, 115 F.3d 125, 133 (2d Cir. 1997); *Booth v. State*, 507 A.2d 1098, 1110-12 (1986), *vacated in part on other grounds by Booth v. State*, 482 U.S. 496, 508 (1987).

²⁵⁰ See *supra* Part I.B.1.a.

²⁵¹ See *supra* Part I.B.2.a.

[†] J.D. Candidate, Brooklyn Law School, 2010; B.A., Cornell University, 2007. To the members of the *Brooklyn Law Review*, I thank you for your tremendous time and effort in preparing this Note. To my loving family, I especially thank you for your unwavering support throughout all my endeavors. Finally, to Andrew, I thank you for your endless love and for always believing in me.