

### Dialogic Allocution

Recently, the U.S. Supreme Court has allotted federal judges increased discretion in criminal sentencing, but the Court's move has not quieted critics who view this trend as unjust. While the Court extended the borders of judicial limitations, at the same time the precise borders were rather opaque. Supporters claimed the obscurity was in the name of progress, while critics decried the injustice of a system that permits a *single* sentencer to override the desires of an *entire* legislature. Due to *Apprendi*<sup>1</sup> and its progeny, the two camps have increased the fervor of their argument. Nonetheless, the Supreme Court has taken recent steps to mold the current federal sentencing scheme into one that the pro-discretion advocates find more favorable. Despite the Court's empowerment of judicial discretion,<sup>2</sup> it has not settled the still outstanding questions: what precise discretion do judges have and is that level of discretion warranted?<sup>3</sup>

While various levels of governments have crafted,<sup>4</sup> and continually are crafting, new systems, one aspect of sentencing has been continually neglected: allocution.<sup>5</sup> Some scholars see

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<sup>1</sup> Apprendi v. New Jersey, 530 U.S. 466 (2000).

<sup>2</sup> See particularly Justice Breyer's opinion for the court in United States v. Booker, 543 US 220, 244-47 (2005), in which he states that the Court's opinion, "requires a sentencing court to consider Guidelines ranges, . . . but it permits the court to tailor the sentence in light of other statutory concerns as well." As a direct result, sentencing judges could depart from the guidelines' recommendations and apply what the judge considered statutorily just. Despite the increasing discretion, it is not plenary. Sentencing courts are still constrained by the facts of the case and the requirements of statute and mandatory authority. *See id.*

<sup>3</sup> This question, although perennial, was particularly pertinent after Apprendi v. New Jersey, 530 U.S. 466 (2000). Since the Court's decision in that case, federal sentencing judges have wrestled with the application of the guidelines where they required additional findings of fact. *See, e.g.,* Booker, 543 US at 244-47.

<sup>4</sup> *See* S.B. 56, 24th Leg., Reg. Sess. (Ala. 2005). *See, e.g.,* Report of the Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing (Feb. 17, 2005) *available at* [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/tennessee\\_task\\_force\\_report.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/tennessee_task_force_report.pdf); S.B. 5477, 59th Leg., 2005 Sess. (Wash. 2005); S.B. 96, 113th Gen. Assem., Reg. Sess. (Ind. 2005).

<sup>5</sup> Although Professor Stephanos Bibas refers to allocution during his discussion of Blakely's impact, he uses the term to refer solely to the defendant's plea. *See* Stephanos Bibas, Blakely's Federal Aftermath, 16 Fed. Sent. R. 333, 5 (2004).

allocation as historical with only minimal contemporary importance; others go so far as to argue in favor of completely eliminating this fundamental right.<sup>6</sup> However, this right might be the key for achieving justice in sentencing, by enlarging the sphere of dialogue. Seriously involving the defendant in the dialogue would allow judicial actors to forge sentences while balancing diverse concerns of societal justice and individual equity. These sentences would encourage equity across defendants, victims, and crimes.

With the goal of enlarging the pool of possible solutions, this article proposes a new model for allocation. This “dialogic allocation” model encourages the defendant to engage the judge in a discussion about the sentencing guidelines. The defendant likely comes from a different social and economic class than the judge and therefore brings a differing perspective to the discussion. The result of the dialogue would lead the judge to re-evaluate his understanding of the system and its effects on punishment, perhaps questioning certain assumed premises. In addition, with each discussion, the individual defendant’s uniqueness will become more prominent within the judge’s mind, increasing the ontological legitimacy.

This article will discuss briefly the major decisions that have led to the current problems in sentencing law. This will provide perspective on the potential contribution of dialogic allocation. The following section introduces a new method for dialogically engaging the defendant in sentencing. This method will encourage the sentencing judge to involve the defendant in the discussion about the sentencing ranges and the guidelines that propose them.

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<sup>6</sup> As the Supreme Court held in *Green v. United States*, 365 U.S. 301, 304 (1961), the Federal Rules of Criminal Procedure “explicitly afford[] the defendant two rights: ‘to make a statement in his own behalf,’ and ‘to present any information in mitigation of punishment.’”

We then discuss the theoretical implications of the model and delineate their impact on current practice. We conclude by considering the critiques of allocution in contemporary scholarship, and show why they do not undermine the case for our proposal.

### *Apprendi, Blakely, Booker/Fanfan*

Since 2000, the Supreme Court has issued three major opinions that severely undercut the determinate scheme of criminal sentencing. The first opinion, *Apprendi*,<sup>7</sup> held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>8</sup> The Supreme Court’s opinion focused, however, not on the statute that could double the length of the sentence, but on whether the judge needed to present the elements of the additional length to the jury. The Court sidelined the judge’s discretion.

The next milestone came in *Blakely*.<sup>9</sup> There, the Supreme Court held that the sentencing judge had violated the defendant’s Sixth Amendment rights when the judge found – on his own – that Blakely had acted with “deliberate cruelty.”<sup>10</sup> The judge used that finding to depart upward from the maximum punishment the Guidelines would have allowed. The Court ruled that the

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<sup>7</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>8</sup> *Apprendi*, 530 U.S. at 489.

<sup>9</sup> *Blakely v. Washington*, 542 U.S. 296 (2004). Blakely’s plea admissions supported a maximum sentence of fifty three months. The sentencing judge found that the defendant acted with deliberate cruelty, a statutorily defined ground for departure, and imposed a sentence of ninety months. The lynchpin in this case was that the judge found these facts on his own, without the defendant admitting to them in the plea or being found by a jury.

<sup>10</sup> *Blakely*, 542 U.S. at 303.

judge could have imposed a higher maximum only if the jury had found “deliberate cruelty” or if Blakely himself had admitted to “deliberate cruelty” in his plea.<sup>11</sup>

*Blakely* caused chaos in the federal judiciary, leading many district court judges to wonder about the decision’s impact on the federal sentencing guidelines. In many cases, the guidelines *required* the court to make departures from the statutory language, which were paradoxically outlawed by *Blakely*. As the public defenders were making several *Blakely* objections, judges wondered about their options in applying the guidelines.

Judges initiated creative proposals to solve *Blakely*’s practical problems. One of the first district opinions came from Judge Cassell in *United States v. Croxford*.<sup>12</sup> Here Judge Cassell provided three options in dealing with the post-*Blakely* landscape: declare the guidelines unconstitutional, convene a sentencing jury or ignore upward adjustments/departures. He eventually chose the first option.<sup>13</sup> Judge Cassell’s three-option innovation highlights the idea that judges took the initiative to engage in creative dialogue about the guidelines. Across the circuits, judges attempted to deal with the *Blakely* decision either by declaring the guidelines unconstitutional or by holding that *Blakely* did not apply to the federal sentencing scheme. This dialogue among the judges produced creative proposals and analyses. The judges’ institutional tinkering<sup>14</sup> produced numerous appeals to the Supreme Court, which granted certiorari in *United*

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<sup>11</sup> See *Blakely*, 542 U.S. at 313.

<sup>12</sup> *United States v. Croxford*, 324 F.Supp.2d 1230 (D. Utah 2004).

<sup>13</sup> The second option was implausible because the statute did not authorize the option; also, sentencing juries would have difficulties with the detailed nuances of sentencing. The third option would undermine the intent of the guidelines since a judge would have to apply some parts of the guidelines while ignoring other mandatory parts. See *Croxford*, 324 F. Supp.2d at 1243-44.

<sup>14</sup> For more on the beneficial effects of institutional tinkering, see ROBERT UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996).

*States v. Booker* and *United States v. Fanfan*.<sup>15</sup> These two cases had distinct judicial maneuvers. In *Booker*, the sentencing court found that the defendant possessed more drugs than were found by the jury; as a result, the judge increased the punishment by more than eight years in length. In *Fanfan*, the judge found certain elements that would have increased the defendant's sentence by more than ten years; yet the judge refused to apply the enhancement provision of the federal sentencing guidelines. Through these two cases, the Supreme Court ultimately declared unconstitutional the sections that make the sentencing guidelines mandatory authority for the federal sentencing judge.<sup>16</sup>

After *Booker/Fanfan*, federal sentencing judges have more discretion than the guidelines previously permitted; in most cases, judges may regard the federal sentencing guidelines as persuasive authority. Their creative institutional tinkering, combined with their national dialogue, paid off. While the dialogues among the judges benefited the criminal justice system tremendously, the dialogues have not included other sentencing actors, who have particularly pertinent perspectives. Their inclusion in the dialogue is essential.

### **The Proposal**

We must shift our thinking in order to achieve justice in the sentencing process. This shift should favor increasing the defendant's participation in the ongoing dialogue about sentencing. The system is already set up to facilitate this shift in thinking. Currently, the federal

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<sup>15</sup> United States v. Booker, 543 U.S. 220 (2005).

<sup>16</sup> 18 USC § 3553(b)(1) and 3742(e). See, e.g., Booker, 543 U.S. at 246-49.

system requires judges to provide defendants with an opportunity to make a statement, called allocution,<sup>17</sup> before the judge pronounces the sentence. The rules of procedure require the judge to:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf; (ii) address the defendant personally in order to permit the 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.<sup>18</sup>

Despite these formalities, the Federal Rules of Criminal Procedure leave open the particular form allocution should take.<sup>19</sup> They require the judge to allot each side time to “speak.” The defendant may “present any information to mitigate the sentence” in addition to, or in substitution for, the opportunity to speak; this fact distinguishes the purpose of the attorney’s speech from the purpose of the defendant’s.<sup>20</sup> Perhaps one reason for this distinction is that the defendant has a greater stake in allocution than either attorney does; the defendant’s liberty and livelihood are on the line. Although the trial is past and the facts have been found, the length and severity of punishment have ancillary effects on the defendant’s, and the victim’s, life. The defendant’s future rights, duties, and obligations substantially affect the allocution aspect of sentencing.

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<sup>17</sup> FED. R. CRIM. P. 32(i)(4)(A)(ii).

<sup>18</sup> FED. R. CRIM. P. 32(i)(4)(A).

<sup>19</sup> Courts have determined certain standards that form the threshold for Rule 32 analysis. *See* Jon M. Sands, *Allocution in Federal Sentencing: The Right of a Rite*, 29-MAR CHAMPION 43 (1999) (“Questions to the defendant, and a colloquy about guideline issues, does not satisfy the Rule 32 requirement of an allocution opportunity. Even if it would have not changed the sentence, the defendant deserved a chance to speak.”)

<sup>20</sup> *Id.* *See also* State v. Hinchey, 890 P.2d 602 (1995) (holding that the purpose of allocution is to allow the defendant to make a mitigating statement for the judge to consider in determining the sentence.)

The conceptual nature of the paradigm shift is simple: rather than thinking about allocution as the defendant engaging in monologue or making a statement, we should think of allocution as a chance for the judge and the defendant to engage in dialogue. The contemporary dialogue should be about the sentencing guidelines, substantively and procedurally, since it is currently the most pressing issue. The dialogue can cover broad topics (such as the justice of the guidelines<sup>21</sup>) or increasingly narrow themes (such as the number of days in confinement the punishment should entail<sup>22</sup>). In any case, the judge should allow for dynamic topics, facilitating discussion of urgent issues or themes.

To encourage the initiation of the discussion, judges should allot a minimum of five minutes for dialogic allocution.<sup>23</sup> Although allocution may last much longer, setting a minimum standard encourages the customary legal actors to take advantage of the time allotted. Once dialogic allocution becomes the norm, then the time limit can be dispensed with, so long as the dialogue continues to be meaningful.

The judge could lead the dialogue to produce the greatest benefit for all interested parties. For example, the judge could ask the defendant what the defendant thinks about the process and the possible lengths of sentences. With a variety of dialogic tactics, the judge can speak *with* the defendant and show the defendant the aims of the system in achieving justice and fairness. In the

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<sup>21</sup> Perhaps the judge and the defendant will discuss the justice of the entire guidelines. More often than not, they will discuss the justice of the guidelines as applied to the instant case.

<sup>22</sup> The ranges in the guidelines would give rise to these narrow themes.

<sup>23</sup> The five-minute threshold is arbitrary. The important factors to consider are: does the length of time allow the defendants to express themselves suitably? Does the length of time allow for a serious discussion? Does the length of time permit the judge and the defendant actively to engage each other?

same vein, the defendant can speak *with* the judge instead of *at* the judge; the defendant can show the judge how the system fails to produce justice and fairness.

If this method is consistently applied, the discussions will exhibit a genuine tendency to evaluate the efficacy of the guidelines, leading to the creative invention of remedies for the guidelines' failures. For instance, judges might notice defendants regularly discussing similar concerns. Perhaps the defendant is distraught with the inequities of the sentencing ranges; perhaps the defendant disagrees with the basis for the particular structure of the process. Judges, as repeat players, will notice trends in the common concerns of the defendants, encouraging the judges to engage in useful institutional tinkering.

### **Virtues of Dialogic Allocation**

Dialogic Allocation serves three foundational goals: it changes the focus from mathematical computation to ontological deliberation; it serves a variety of institutional/cultural education goals; and it increases the scope of participatory parity.

By instituting dialogic allocation, legal actors will consider the defendant as a human, rather than another variable to factor into the equation.<sup>24</sup> Throughout the current process, the judge learns of the defendant's historical and socio-economic background. The judge then uses

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<sup>24</sup> See Sands, *supra* note 14, at 45 (“Allocation . . . serves both an equity and a ritual. In equity, it allows the court to hear the defendant as an individual before imposing sentence; in symbolic ritual, it allows the defendant to make a last statement before the punishment of the state is imposed. . . . [I]t is not only to the sentencing that allocation speaks.”).

this background to form his basis for judgment.<sup>25</sup> Prior to the Guidelines, the primary motive for considering the unique background of each defendant was to individualize the process. As time progressed, concerns regarding institutional efficiency won over thorough individualization. Rather than seeking out the uniqueness in each individual, institutional actors relied more heavily on number crunching. Yet, traces of the individual-component remain in the system. For example, the defendant has the right to have an attorney present to translate the defendant's intentions into legally recognized courses of conduct.<sup>26</sup> This right permits the defendant to have a role, albeit limited, in the way the trial evolves. By providing this role, the institution reaffirms its commitment to the vital, ontological component of the criminal justice system.

Dialogic allocution increases that precise ontological component of the sentencing process. The defendant will likely have suffered deprived circumstances in the time leading up to the criminal trial. This depravity can be overcome by dialogic allocution. By engaging the defendant as a serious discussant, the judge serves to restore human qualities to the defendant by treating the defendant as a rational thinker, rather than merely a deviant. 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."<sup>27</sup> This last stand also permits the defendant "a chance to express his self-respect, and to stand as an individual before the court. For no other reason, the defendant

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<sup>25</sup> The guidelines dictate that certain variables must be left out of the equation. U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2005). However, these same variables must necessarily creep into the equation through alternate venues. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5H1.9 (2005).

<sup>26</sup> U.S. CONST. amend. VI.

<sup>27</sup> Jon M. Sands, *Allocution in Federal Sentencing: The Right of a Rite*, 29-MAR CHAMPION 43 (1999).

must be allowed to clothe himself with dignity.”<sup>28</sup> Restoring the defendant’s dignity both benefits the defendant and society, since the “mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.”<sup>29</sup> Although the guidelines’ numbers game might continue to have some sway, judges will focus more on the humanness of the defendant, rather than his numerical score.

When judges treat defendants as serious discussants, the defendants will convey a differing perspective on the sentencing guidelines. As is true in a large number of criminal cases, a defendant may come from a disadvantaged background and/or have had experience with the criminal process itself. The defendant’s intimacy with the criminal process might stem from firsthand experience or through relatives or friends who have also been involved in the process. Therefore, with this perspective, the particular defendant could evaluate the effect, and after-effects, of the sentencing regime and perhaps comparatively analyze the different sentences imposed.

Suppose a defendant is involved in an illegal immigration case. This is an ideal type for using the dialogic allocution principle.<sup>30</sup> In these situations, the judge must sentence an individual who is not a fully recognized American citizen. Therefore, the person will have lived in other parts of the world. In these situations, the judge (and attorneys, for that matter) benefit from the different perspective, which the defendant brings to the bar. The defendant *might* have an acquaintance with some of the laws of the defendant’s domicile. If this is the case, then

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<sup>28</sup> *Id.* at 46.

<sup>29</sup> Marvin E. Frankel, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 9 (1973).

<sup>30</sup> For purposes of the example, we will assume that the defendant and the judge both speak the same language.

dialogic allocution could enable the judge to evaluate the sentencing guidelines from an international perspective. The judge would come to an understanding of the differences in national practices and might rethink the role and scope of the guidelines. Perhaps the judge might become more convinced regarding the effectiveness of the guidelines; perhaps the judge will come away impressed with the defendant's domicile's approach to sentencing. In either case, both the defendant and the judge will leave allocution with a refined understanding shaped by the dialogue.

If the defendant is not familiar with their domicile's sentencing procedure, dialogic allocution would still be an excellent method for critically evaluating the guidelines. The defendant will come to the discussion with a different ideological background than the judge. The defendant will likely have a different cultural and socioeconomic background as well. Many defendants come from an ethnic minority background, while many judges bring an ethnic majority background with them.<sup>31</sup> Individuals from these two backgrounds have very different methods of expression and discussion. The type and level of discourse is affected by a variety of social norms that include culture, customs, formal (and informal) education, life experience, ethnicity, sexual orientation, gender, race, geographical background, and a host of other variables. Each of these variables affects the way a person expresses himself or herself in any

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<sup>31</sup> According to Bureau of Justice Statistics, eighty-six percent of the current nominations to the federal bench are White, while this race only makes up seventy-five percent of the total population. In the same vein, Blacks make up nearly thirteen percent of the population, while only seven percent of those appointed to the federal bench are Black. U.S. Census Bureau, *Profiles of General Demographic Characteristics*, available at <http://www.census.gov/prod/cen2000/dp1/2kh00.pdf> (Jan. 14, 2006). Bureau of Justice Statistics, *Characteristics of Presidential Appointees to U.S. District Court Judgeships*, available at <http://www.albany.edu/sourcebook/wk1/t182.wk1> (Jan. 14, 2006).

setting. Due to these various methods of thought and expression, the defendant could evaluate different thoughts the judge might present from an alternative position, perhaps even a diametrically opposed position. The defendant could consider the sentencing range and make comparative evaluations, from the defendant's position. These judgments might use personal experience as the standard. Whereas the judge and attorneys would attempt to base their decision on legally approved logic, the standard for the defendant could involve social norms as the basis for evaluation. The social norms involved would differ from those the judge would be intimately familiar. The defendant would rely on both his personal experience and that of others within the system.

### **Educational Component**

Dialogic allocution also serves to educate and inform the various actors in the legal courtroom. However, as will be quickly noticed, each person's education will be tailored to his particular situation and role in the process. Each member will bring to dialogic allocution various predispositions and will leave, as a result of the discussion, with an altered world-view.

#### *The Judge*

For the judge, dialogic allocution will be an ongoing discussion, between himself and the defendants. This perpetual dialogue will educate the judge in cultural methods of

communication. The word “culture” refers here to the differing methods of reason people use to generate conclusions, principles, theories, and even methods themselves; culture relates to the ways in which people communicate with one another and form consensus. In some geographies, culture means simple logic: forming major and minor premises and synthetically deducing conclusions, which encourage action. In others, culture means folklore: narrating stories to others to teach action principles.<sup>32</sup>

Consider how this understanding of culture would affect allocution. Judges tend to engage continually in very complex, formal discussions that follow rigid rules of construction. As a result, when they sit before a defendant who uses slang or profanity, combined with incorrect grammar, to express remorse, the judge might subconsciously equate this behavior with a lack of remorse, when in fact the defendant *is* expressing remorse with his language tools. The judge could view a truly penitent defendant as having quite the opposite disposition. By misconstruing another culture’s ends, any person, whether judge or layperson, is liable to neglect that culture’s means.

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<sup>32</sup> To make this point concrete, it is useful to draw in an example from José Enrique Rodó. In his book *ARIEL*, Rodó emphasizes the cultural differences between North and South America. The difference is concisely stated by the following:

Thus, while cognizant and respectful of North American achievements in political freedom, science, and technology [Rodó], in effect, urges the youth of Hispanic America not to become ‘de-Latinized’ in their emulation of the North; hence, the suggested association of the United States with Caliban as distinct from that reverence for beauty and its derivatives, justice and morality, that were implicit in Ariel and that he pled with his ‘students’ to retain. James Symington, *Forward* to JOSÉ ENRIQUE RODÓ, *ARIEL* 9 (1988).

Rodó makes consistent allusions to Shakespeare’s *Tempest* to highlight the fact that North Americans are predominately concerned with market efficiency, as opposed to generating increased amounts of justice. Rodó later in the text asserts that South America is symbolically represented by Ariel who “is for Nature the crowning achievement of her labors, the last figure in the ascending chain, the spiritual flame. A triumphant Ariel signifies idealism and order in life; noble inspiration in thought; selflessness in morality; good taste in art; heroism in action; delicacy in customs.” *Id.* at 98. For Rodó, South Americans, in general, are more concerned with institutional policy rather than institutional structure, in North American terms.

The foregoing plays the largest role in the communicatory aspect of allocution; recall that, as stated above, particular ethnicities are over-represented on one side of the bench, while other ethnicities are over-represented on the other side.<sup>33</sup> When they attempt to engage each other in communication, the judicial actors will seek to understand the defendant's allocution from the judge's social background. In each particular case, the two actors essentially speak past each other. In general, defendants learn that their needs are *corrected* by the system's preconfigured categories, rather than individually recognized.

Due to dialogic allocution, the judge will consider the defendant as a person, develop a sense of the individual capacity of each defendant, and recognize each defendant's ideological and cultural background, rather than analyzing each defendant as merely a quantitative variable in the calculation. With the idea of dialogic allocution in the judge's mind, he will be more open to the possible questions and answers the defendant might have, in addition to the various ways and means of presenting those ideas. Currently, judges consider a defendant's allocution as an example of the defendant's remorse or acceptance of responsibility. Even though a presentencing report might indicate a developed and sustained sense of remorse, the defendant's choice of words and body language in the courtroom could undermine the defendant's effort. If the defendant uses slang or commits a faux pas according to certain social norms, the judge could see this as rebellious activity and refuse to allow downward departures or adjustments. Yet, if the judge has the opportunity to engage the defendant in dialogue, the judge will gain a sense of the defendant's social background, along with the various methods used to

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<sup>33</sup> See *supra* note 31 and accompanying text.

communicate. The judge will be more willing to permit the defendant to speak his mind, in that the judge will see allocution as a dialogue, rather than the defendant's last chance to apologize. Consequently, the defendant will come alive as a human being before the judge's eyes.

The judge, in constant conversation with the defendants, will learn to communicate on different levels with different defendants. Even if this conversation leads to the exacerbation of individual punishments, the focus would be on the entire process, rather than particular sentences. Hence, a judge may make preliminary determinations about a sentence in the judge's own mind before hearing the defendant's allocution, and the fact that he is not persuaded by the dialogic allocution does not mean he failed to give it due consideration.<sup>34</sup> The judges will gain a broader sense of the guidelines' place in American society, and global cultures.

### *The Defendant*

The defendants will also benefit greatly from the discussion. From the discussion, defendants will gain a sense of ways in which they can have an impact on the criminal justice system and, as a side effect, they will leave a successful dialogic allocution with changed future outlooks.

Rather than assuming law is a series of formalities, defendants will play an active role in the process.<sup>35</sup> They will have the sense they were actors in the process and not merely

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<sup>34</sup> See *United States v. Mata-Grullon*, 887 F.2d 23 (9th Cir. 1989).

<sup>35</sup> Nevertheless, their active role will necessarily be limited by constraints already implicit in the organization of the system. See *United States v. Mitchell*, 392 F.2d 214 (6th Cir. 1968) (stating that allocution does not grant the

bystanders. In that the judge will respond to comments and criticisms the defendants voice, the defendants will speak with a governmental representative about concerns they might have regarding the system. If the judge takes seriously the defendant and his ideas about the guidelines, then the defendant's perceived equity will increase.<sup>36</sup> The interesting aspect behind that perception is: as dialogic allocution gains momentum, the perception will evolve into reality. As explained above, the judge will gain a sense of the ways in which defendants express themselves and will therefore be equipped to engage the defendants in the dialogue. The judge's newfound appreciation for differing methods will lead the judge to act with equity as a foundational principle. Therefore, dialogic allocution has the immediate ends of producing perceived equity, while in the long-term increasing actual equity.

Dialogic allocution would also allow defendants to learn, from firsthand experience and conversation, what their alternative futures, and pasts, could be.<sup>37</sup> The defendant could see the effect and purpose of the sentencing guidelines, rather than being both physically and mentally stuck in the same frame of mind regarding the possibility of a different future. The defendant will engage in dialogue about the guidelines and will determine reasons, or the defendant's

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defendant a right to enter into a diatribe against the judicial process and is not a time for platform speeches on philosophical, religious or political issues.)

<sup>36</sup> Wayne R. LaFave et al., *The Right to be Heard: Allocution and the Right to Offer Rebuttal Evidence*, 5 CRIMPROC § 26.4(g) (2006) ("Today, with counsel to speak for him and the ability to testify under oath, the defendant's need to make an unsworn statement in order to get across his side of the story to the sentencer is considerably less pressing. But the opportunity to personally address the sentencer retains both symbolic and practical significance. It may increase for some defendants the perceived equity of the process.") See also ABA Standards for Criminal Justice, at 18-459 (2d ed. 1979) ("It must be acknowledged that the policies behind permitting the defendant to make a statement at sentencing have to do more with maximizing the perceived equity of the process than with detecting misinformation or obtaining a reliable impression of the defendant's character.").

<sup>37</sup> Roberto Unger highlights this idea with his imaginative legal analysis. See, e.g., Unger, *supra* note 14, at 135-47.

cultural methodological equivalent, for or against the justice of imposing certain sentences. Through this process, the defendant will be reminded of the nature of the crime and the possibility of change on the defendant's behalf. Crafting these futures will require the defendant to make certain life-choices, which will allow the defendant to realize those alternative futures.<sup>38</sup> Dialogic allocution will hope to persuade the defendant to first envision an alternate future, and then encourage the defendant to pursue that vision.

#### *Other Courtroom Actors*

Dialogic Allocution will also provide benefits to those individuals inside the courtroom, even if they do not physically participate in the discussion. These actors include the defense attorney, prosecutor, and other bystanders.

The defense attorney will undoubtedly coach the defendant in proper questions to ask or answers to give.<sup>39</sup> Yet, we must not forget that judges are adept at what they do. They are excellent finders of fact. Therefore, if a defendant should simply regurgitate the defense attorney's statement, the judge can then ask certain open-ended questions, which will allow the defendant to participate freely. Judges are keen at discerning facts from fiction, and dialogic allocution will be no different. As a result, the defense attorney will only obtain limited success in coaching the defendant. Nevertheless, the defense attorney might be privy to certain

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<sup>38</sup> Perhaps the sentencing judge could lead the dialogue to focus on these goals and the possible means for reaching them.

<sup>39</sup> Defense attorneys are not permitted to dominate the allocution discussion. *See United States v. Lewis*, 10 F.3d 1086 (4th Cir. 1993). This is one of the reasons why the defense attorneys will prep the defendant.

newfound ideas the defendant has for the system. Perhaps the defendant considers the punishment exceedingly harsh or unjust and provides a strong basis for the opinion; the defense attorney might acquire a renewed conviction for his or her role in the process. The attorney would feel a sense of satisfaction as the defendant expresses some of the same concerns to the judge. The attorney will also walk away with a sense of the judge's convictions regarding the process and the judge's genuine interest in the defendant; thus, the defense attorney, like the defendant, would walk away with a sense of increased equity.

The prosecutor will also endeavor to treat the defendant as an individual. The prosecutor will have encountered the defendant in previous situations, but these situations will likely have been highly scripted, with strict obedience to formality. In the dialogic situation, the defendant will also come alive as a person for the prosecutor. The prosecutor could learn the judge's inclinations towards allowing or forbidding certain adjustments or departures. As well, the prosecutor will regain a respect for the process as the prosecutor watches the defendant attempt to articulate various ideas regarding the state and effect of the guidelines.

Finally, the names appearing within the case materials are not the only parties to the dialogic allocution. Since most sentencings are public proceedings, there will be other people in the courtroom. These people, even though they are not taking an active role in the discussion, will nonetheless listen to the discussion. In so doing, they will gain a sense of the dialogue and benefit from the ensuing discussion. They will also learn about the guidelines and their impact. Many sentencing proceedings are also held in seriatim; therefore there are many other defendants present in the room during allocution. These defendants will quickly learn what dialogic

allocation is and might consider what they would like to speak to the judge about; perhaps they would develop an idea about the sentencing guidelines by listening to other defendants and their engagement with the judge.

Dialogic allocation seeks to accomplish much more than merely an abstract discussion regarding the state of sentencing law. It will serve an informing role for the many individuals who take part in the criminal justice system. It will seek to educate primarily the judge and defendant, but will also have positive externalities.

### **Participatory Parity**

Another great benefit coming from the incorporation of this change is the increasing amount of participatory parity,<sup>40</sup> both internal and external. Currently, certain victims are allowed to take part in allocation.<sup>41</sup> This might seem to diminish the focus on the defendant's statement. Dialogic allocation will aid in restoring both the victim and the defendant to the same playing field. By allowing the defendant to express certain ideas and thoughts,<sup>42</sup> the judge enhances the defendant's voice in the system.

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<sup>40</sup> I follow Nancy Fraser's conception of participatory parity. See NANCY FRASER AND AXEL HONNETH, *REDISTRIBUTION OR RECOGNITION?* 36-37 (2003).

<sup>41</sup> The federal guidelines require the judge to allow time for victims of certain crimes to make a statement. FED. R. CRIM. P. 32(i)(4)(B).

<sup>42</sup> Although defendants would have the opportunity to discuss the larger issues with the judge, the range of topics is not unlimited. Currently, the defendant is barred from introducing new evidence in the allocation context. See *Echavarría v. State*, 839 P.2d 589 (Nev. 1992).

Currently, defendants are the same individuals who are least likely to have their voices represented in the system at large. By solely looking at the distribution of those incarcerated, it appears the current institutional order *disfavors* certain genders, races and ethnic backgrounds.<sup>43</sup> In the same vein, judgeships overwhelmingly *favor* a certain gender, race, and ethnicity, to name a few variables.<sup>44</sup> To understand how the institution has evolved from the *Plessy*<sup>45</sup> days to contemporary times and why it still dis/favors certain social backgrounds, Professor Young provides a descriptive account of the evolution:

Dominative racism involves direct mastery that has its most obvious manifestations in enslavement and other forms of forced labor, race status rules that privilege whites, and genocide. ... [A]versive racism is a racism of avoidance and separation. ... [M]etaracism [is when] almost all traces of a commitment to race superiority have been removed, and only the grinding processes of a white-dominated economy and technology account for the continued misery of many people of color.<sup>46</sup>

As she details, the United States has moved from the dominative racism of the pre-Civil War days to the current metaracism, which is easily cognizable when glancing at the ethnic and racial differences between the judicial decision maker and the person charged with the crime.<sup>47</sup> It is

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<sup>43</sup> Even though the Federal Bureau of Prisons states that Whites make up 56.7% of the prison population, this category is obscured by the fact that it includes Hispanics. Discounting that latter ethnicity from the White category leads to the conclusion that Whites make up 29.2% of the prison population, whereas Blacks constitute 40.2%. Federal Bureau of Prisons, *Quick Facts*, available at <http://www.ukcia.org/research/PrisonsQuickFacts.html#Race> (Jan. 14, 2006).

<sup>44</sup> See *supra* note 24 and accompanying text.

<sup>45</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>46</sup> IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 141 (1990).

<sup>47</sup> In addition, metaracism is evident when considering the institutional rules regarding proper judicial action and appropriate conduct of the accused. Consider the following narrative by Professor Fiss, and accompanying implications:

The persons living in the typical ghetto are black, but, even more significant, they are poor. Many are on welfare, and even those who work tend to earn amounts that place them beneath the poverty line. As a consequence, the housing stock is old and dilapidated, retail establishments scarce, crime rates high, gangs rampant, drugs plentiful, and jobs in short supply. OWEN FISS, *A WAY OUT* 4 (2003). The ensuing inference is those individuals living in the ghetto produce the high rates of crime.

precisely this breakdown of the process that deprives ethnic and racial minorities of a voice in the system. Whereas judges, prosecutors, defense attorneys, and the like, have direct access to the other branches of government, defendants do not. Their only recourse to the system is by waiting for Election Day to cast their single vote.

Dialogic allocution serves to allow the defendants a voice in the system.<sup>48</sup> It is in this unique setting where defendants have the complete attention of the judge. This governmental actor will be able to listen to the defendant's concerns and, after time, will be able to transition those thoughts into motives for judicial action, whether inside or outside the court. Dialogic allocution will not immediately remedy the current lockouts of the process but will open the door for eventual institutional change.

### Critiques

Although the proposal is easily instituted, the intellectual barriers that are currently in effect are more difficult to overcome. Currently, the average judge uses allocution to test whether or not the defendant *truly* accepted responsibility.<sup>49</sup> Therefore, the judge might come to expect the usual statement from the defendant, "I want to apologize for what I have done and I will never do it again." Even though this statement can be powerful, the hardened judge might

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<sup>48</sup> See Sands, *supra* note 14, at 47 ("It is after all the final chance the defendant has in asking the court to recognize him as an individual and to sentence accordingly.").

<sup>49</sup> Emphasis is placed on the veracity of accepting responsibility in that prosecutors may move for acknowledging the defendant accepted responsibility. The defense will likely join the motion. Yet, the judge still determines whether the attorneys' decision was correct.

consider it rather pedestrian, since he has heard the statement many, many times over. Yet, the aim of allocution is to provide the defendant the opportunity to speak. This might be the first time the judge actually hears the voice of the defendant, despite the process of trial and accompanying legal action. This is the moment the defendant becomes human, unfiltered from legal jargon. This is the moment a defendant gains an identity, rather than solely being a mathematical variable for calculating the sentence.

Despite this benefit, the trend in modern allocution scholarship downplays the practical role of allocution. According to these scholars, the extent of the impact of allocution is purely historical;<sup>50</sup> therefore, allocution is currently irrelevant.

Jonathan Scofield Marshall argues that allocution is made-for-television, and nothing else. In his *Lights, Camera, Allocution: Contemporary Relevance or Director's Dream?*,<sup>51</sup> he recites the history of the right to allocute in a criminal trial. He provides a number of instances in which the right *played* a major role in determining whether the defendant would be punished for the crime;<sup>52</sup> yet he continues on to explain that each role that allocution served in history is currently void. For example, Marshall presents four arguments which detail why allocution is outmoded: (1) allocution cannot be relied upon to overcome incompetencies of the defendant's attorney; (2) the presentence report's ability to explain prior convictions is far superior; (3)

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<sup>50</sup> Allocution has long had an important role in criminal justice. “As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal.” *See* Anonymous, 3 Mod. 265, 266, 87 Eng.Rep. 175 (K.B.)” *Green v. United States*, 365 U.S. 301, 304 (1961).

<sup>51</sup> Jonathan Scofield Marshall, *Lights, Camera, Allocution: Contemporary Relevance or Director's Dream?*, 62 TUL. L. REV. 207 (1987).

<sup>52</sup> *Id.* at 210. *See also* Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968) (explaining the purpose of allocution was to give the “defendant a formal opportunity to present one of the strictly defined legal reasons which required the avoidance or delay of sentencing: he was not the person convicted, he had benefit of clergy or a pardon, he was insane, or if a woman, she was pregnant.”).

allocation disproportionately benefits eloquent and remorseful defendants; and (4) little is lost by the defendant if the right is abolished.

According to Marshall, the right now serves to cause more harm than good for the defendant. At allocation, the defendant's emotions are at an all time high, since allocation occurs after the criminal trial has concluded but before the sentence is handed down. It is likely the defendant will slip up and commit any number of legal, procedural, or social errors that might be used to increase the amount of punishment. Because of that chance, Marshall states that allocation "presents dangers that far outweigh the infrequent times that a defendant's sentence is actually mitigated as a result of an allocutory address."<sup>53</sup> He proposes the abolishment of the right.

Yet, the finer foundational points of Marshall's argument can be interpreted to provide an alternate conclusion, one that argues in favor of cementing the right within institutional practice and procedure. Each of Marshall's four reasons assumes the most important factor in allocation is the length of the defendant's sentence. Marshall considers the role of allocation from the effect it has on the immediate determination of the sentence in question.<sup>54</sup> The length of the sentence is the cornerstone of Marshall's analysis. Despite his treatment of the historical and practical reasons for the sentencing problems, he does not consider the theoretical reasons

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<sup>53</sup> *Id.* at 223.

<sup>54</sup> This perspective neglects the broader effect that allocation might have through multiple cases. *See, e.g.,* United States v. Mata-Grullon, 887 F.2d 23 (6th Cir. 1989) (noting that a judge may make preliminary determinations about a sentence in his mind before hearing the defendant's allocation, and the fact that he is not persuaded by the allocation does not mean he failed to give it due consideration).

regarding why the situation is currently so dire, and whether or not there is a possible remedy short of complete elimination.

### **Communicatory Breakdown**

The primary reason for the current disrepair of allocution stems from the malfunctioning discourse between the judge and the defendant. The judge brings important predispositions to the courtroom, as does the defendant and each actor in the case.

As discussed above, Marshall prefers the attorney's voice to the defendant's. His reasoning tracks the following:

[I]t would seem appropriate, where the defendant has counsel, to put the question to counsel rather than to the defendant himself. Since it may be expected that reasonably diligent counsel will come forward with any allocutory pleas, little would be lost if the ceremonial allocution were no longer required, provided that defendant or his counsel has other adequate opportunity to present allocutory pleas.<sup>55</sup>

Yet, this best-case-scenario is hardly the norm. In reality, judges and attorneys come from vastly different backgrounds than defendants do. As written above, many defendants come from an ethnic minority background, while many judges bring an ethnic majority background with them. Therefore, a defendant will present thoughts in a way that might be completely foreign to either the judge or attorney, who would then re-present the thoughts to the judge.<sup>56</sup> They will either

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<sup>55</sup> Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 832-833 (1968).

<sup>56</sup> "Justice Kennedy Commission, *Report to the House of Delegates on Racial and Ethnic Disparity in the Criminal Justice System*, 53, available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf> ("[W]hen a prosecutor decides to offer a favorable plea bargain to a white defendant but not to a black defendant charged with the same offense and having the same criminal record, there is a racially

misconstrue the message or completely neglect it. This failure to engage each other's message adds, whether conscious or subconscious, to the communicatory breakdown.

### **Efficiency**

A pressing counterargument follows efficiency-focused lines of reasoning. Since many defendants come to sentencing with a plea bargain in hand, sentencing is usually a quick process, swiftly running through the formalities. It might appear as though dialogic allocution would lengthen the process and consequently make it inefficient. Although dialogic allocution promises greater discussion about the guidelines, the function the dialogue serves will not be inefficient. A number of reasons indicate why.

It is first important to determine the scope of the definition of efficiency. There are two primary ways to consider it. The first is the short-termed perspective. This perspective would look solely at the amount of time and number of resources required to conduct a particular dialogic allocution. This calculus would argue that dialogic allocution does not make for an efficient proceeding; the extra time spent on allocution would only increase the amount of time it currently takes to conduct a sentencing.

This short-term perspective fails to comprehend the beneficial effects of the long-term application. If a sentencing judge invests additional time on a defendant and both informs and is

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disparate result. The prosecutor, like the police officer, may honestly and sincerely believe that one suspect is contrite while another is not because of the suspect's manner and behavior. To the extent that the suspect looks and behaves like the prosecutor, the prosecutor may tend toward leniency. To the extent that the suspect looks and behaves differently from the prosecutor, the prosecutor may be inclined against leniency.”).

informed by the defendant, then long-term benefits will follow. The long-term impact of the discussion would benefit all the parties involved. Perhaps they will not remember the dialogue verbatim, but what is important is the experience of the dialogue and the exchange of ideas. This experience will positively impact, to various degrees, the lives of the participants. This impact will encourage defendants to reevaluate their alternative futures, lead them to a reduction in recidivism, increase their knowledge of the criminal justice system, and enlarge their understanding of their role as a citizen in the community. Informing, and being informed by, the defendants will allow the sentencing judge to address their concerns more effectively and consequently make sentencing more efficient.

A simple example shows how this works out. Suppose one defendant is deterred from committing a similar crime in the future. The hours that would have been committed to the punishment of the future crime are now absent from the schedules of the parole officer, probation officer, trial judge, jury, prosecution, defense, bailiffs, and many others. The countless hours that each crime requires from initial booking to the final release are erased. These hours will make up for the time spent on many defendants. For each hour saved on future deterrence, it would compensate for twelve five-minute dialogic allocutions.

The decrease in overall time is a minor point; the major theme is that the decrease in recidivism will work to further broader themes of justice and participatory parity. Efficiency cannot solely be understood to center on the length of time which dialogic allocution would require of the trial process itself. Efficiency would have to account for the cost, as well as the benefit, of dialogic allocution based upon the actual performance of it, the side effects/benefits,

and the long-term impact of the discussion. In this sense, long-term efficiency will not be hampered.

### **Conclusion**

Dialogic allocution will serve to further many goals of the current sentencing scheme. It will allow the defendant to participate actively in the process, gaining a sense of participatory parity as a result. It will also allow judges to gain a deeper understanding of the concerns of defendants at this phase of the trial.

One of the most beneficial aspects of dialogic allocution is that it will actively encourage institutional tinkering with the guidelines. They are under continual attack by federal district courts. Including defendants in the general discussion could be one of the final steps in remedying the defects of the guidelines. The defendants' ideas might be what the criminal justice process is waiting for. This next step in the mental conception of sentencing will benefit everyone involved in the process.